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Study of official opinions concerning education rendered by the attorney general of the State of Montana 1946-1955

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A STUDY OF OFFICIAL OPINIONS CONCERNING EDUCATION RENDERED BY THE ATTORNEY GENERAL OF THE STATE OF MONTANA 1946-1955

by

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THE PROBLEM

Statement of the problem. In a study of literature concerning the development of the public school system in the State of Montana it was noted that very little mention was made of the office of the attorney general. The history of the Montana public school system has been the subject for a section in most of the general histories of Montana. It has been the subject of at least one doctoral dissertation. In these studies, however, very little mention was made of the attorney general and no mention was made of the weight of his opinion.

The weight of an opinion of an attorney general of the State of Montana was decided in the case of Barr v. District Court. It may be stated as follows:

> "While construction of a law in an an opinion of an attorney general is not binding upon the supreme court, even though acquiessed in by several legislative sessions, it is entitled to respectful consideration, and will be upheld if not palpably erroneous."

This study, in an attempt to show the importance of the position of the attorney general to education in the State of Montana, has compiled in a single paper the Official Opinions of the Attorney General of the State of Montana which have had some effect on Montana's educational system from January 1, 1946 through December 31, 1955. These opinions have been placed together in specific categories in

such a manner that they will be easily accessible to all interested persons without necessitating such persons having to go to the Official Report and Opinions of the Attorney General when a legal problem ruled on by the attorney general confronts him. This compilation of official opinions of the attorney general might also be a useful reference tool in a course in school law.

Importance of the study. Since the official opinions of the attorney general carry the weight of law until overruled by the courts, there was a need for them to be compiled in such a manner that the opinions rendered in circumstances of a similar nature might be seen together and comparison and collation might more easily take place. In this way the actual effect of the office of the attorney general is more easily seen. This study might eliminate some unnecessary requests to the attorney general for opinions on school matters where opinions covering like circumstances already exist.

Procedure used. The first step was to determine what constitutes an official opinion of an attorney general. An official opinion of an attorney general is an opinion rendered in a field of general interest to the people of the State of Montana published in the Report and Official Opinions of the Attorney General. During the ten year period under consideration countless numbers of letters of opinion were written by the attorney general which differ from the official opinions

only in that the attorney general did not deem them to involve questions of general public interest and therefore did not have them published.

With this in mind the next task was to extract all of the official opinions of the attorney general which concerned education from the Report and Official Opinions of the Attorney General.

Since no volumes of the Report and Official Opinions of the Attorney General have been issued since early 1951, the problem of compiling these opinions was one of much greater magnitude than had been expected. It would have been impossible without the cooperation of the then Attorney General, Arnold H. Olsen, and his first assistant Moody Brickett.

The pertinent official opinions were segregated according to specific headings as seemed necessary in the light of the problem considered and placed under these headings in chronological order.

As an added precaution the writer used the official opinions exactly as they were rendered by the attorney general. No editing was done. No personal views were injected. Great care was taken to quote the attorney general exactly. If the terminology of the attorney general had been taken out of context or if briefing had been attempted, extensive explanations would have been necessitated and the meaning or the intention of the attorney general easily might have been altered.

Each of the official opinions reported contains the opinion number and year in which the opinion was rendered, a brief summary of the opinion in the words of the attorney general and the letter written by the attorney general to the person or agency requesting the opinion in which the facts of the case and the rule or laws utilized by the attorney general in reaching his decision were given.

At the conclusion of each chapter there is placed a section of references. These references indicate the particular volume of the Report and Official Opinions of the Attorney General in which the opinions used in the chapter can be found.

DEFINITIONS OF TERMS

Appellant. One who appeals from a decision of law.

Conversion. Illegally taking and using the property of another person as if it were ones own.

Decree. An authoritative order or injunction forbidding some action.

Defendant. A person required to make an answer in a legal action.

Injunction. A court writ requiring a party to do or restrain from doing certain acts.

Judgment. The determining, as in a court, what conforms to law and justice; also the decree or sentence of a court.

Mandamus. A writ issued by a court against a lower court or against a corporation or an individual, to enforce some duty.

Petition. A formal request, addressed to an official person or body, for some privilege or right.

Prohibition. A declaration or injunction forbidding some action.

Tort. Any wrong, injury or damage.

Writ. An order issued in the name of the sovereign power or in the name of a court or judicial authority, commending the performance or non-performance of some act.

CHAPTER II

ELECTIONS

Opinion 131 - 1946

Held: A public meeting at which candidates for the office of school trustee of a first class district are nominated must be held forty full days before the date of the election, and as held in the above case, the day of the meeting and the day of the election must be excluded from the computation of the forty day period.

March 5, 1946

Mr. Horace J. Dwyer
County Attorney
Deer Lodge County
Anaconda, Montana

Dear Mr. Dwyer:

You have submitted the following for my consideration:

> The Clerk of School District No. 10, Deer Lodge County, Montana, has advised you that a group of fifty-seven electors held a meeting on Monday night, February 25, 1946. He stated that notice was published or extended to the public to attend said meeting, but on the other hand, an invitation or request was extended by telephone to the said electors that attended said meeting. The purpose of the meeting was to nominate two nominees to run for trustees of a school district. Did that constitute a bona fide public meeting in accord with Section 990, Revised Codes of Montana, 1935, as amended by Chapter 205, Laws of 1943, at page 399?

Section 990, Revised Codes of Montana, 1935, as amended by Chapter 205, Laws of 1943, provides in part:

> "In districts of the first class, no person shall be voted for or elected as trustees unless he has been nominated therefore at a bona fide public meeting, held in the district not more than sixty (60) days nor less than forty (40) days before the day of election and at which at least twenty (20) qualified electors were present..."

The meeting in question was held on February 25th and the election is to be held April 6th. (Section 987, Revised Codes of Montana, 1935.) The meeting was held more than forty days before the election if the day of the election is counted as one of forty days. However, if the day of the election is excluded from the computation, the meeting was held on the fortieth day before the election and the statute provides the meeting should be held not "less than forty (40) days before the election."

Our Supreme Court in State v. Mountjoy, 82 Mont. 594 268 Pac. 568, considered a statute which required that petitions for nominations be filed "not less than forty days before the date of the primary nominating election." The court said in construing the provision:

> "The language of the statute is exclusive, and Section 10707, Revised Codes of 1921, providing that "the time in which any act provided by law is to be done is computed by excluding the first day and including the last,' etc., relied upon by the learned counsel appearing in support of the secretary of state's position is without application. (State ex rel St. George v. Justice Court, 80 Mont. 53 257 Pac. 1034.) As the act here required must be done at least forty days before the date of the primary election, which is July 17 this year, it is manifest that July 17 cannot be included in computation of the forty-day period. The statute says it must be prior to the date of election, July 17, and forty days before July 17 would be June 6, as full days are required and the date of filing must be excluded from computation."

The above quoted case is conclusive of the meaning of the language used in Section 990, as amended.

It is therefore my opinion that a public meeting at which candidates for the office of school trustee of a

first class school district are nominated must be held forty full days before the date of the election, and as held in the above case, the day of the meeting and the day of the election must be excluded from the computation of the forty-day period.

Sincerely yours,
R. V. BOTTOMLY,
Attorney General

Opinion 214 - 1946

Held: An absent voter's ballot for a school district bond election has not been authorized by our legislature and therefore the only ballots which may be counted at such election are those cast by qualified electors who are present at the polls and vote in person.

October 30, 1946

Mr. R. T. Delaney
County Attorney
Lake County
Polson, Montana

Dear Mr. Delaney:

You have requested my opinion concerning the right of a qualified elector to vote by absent ballot in a special school district bond election. You adviseme that the special election will be held on the same day as the general election.

Section 715, Revised Codes of Montana, 1935, as amended by Chapter 234, Laws of 1943, provides:

> "Any qualified elector of this state, having complied with the laws in regard to registration, who is absent from the county or who is physically incapacitated from attending the precinct poll of which he is an elector on the day of holding any general or special election, or primary election for the nomination of candidates for such general election, or any municipal, general, special or primary election, may vote at such election as hereinafter provided." (Emphasis mine.)

The above quoted section would seemingly grant the authority and right to a qualified elector to vote by absent voter's ballot at a school bond election as it would be a special election.

However, Section 716, Revised Codes of Montana, 1935, as amended by Chapter 234, Laws of 1943, provides that those who are eligible to such absent voter's ballot "may make application to the county clerk of such county, or to the city or town clerk, in the case of a municipal, general, or primary election, for an official ballot or official ballots to be voted at such election as an absent or physically incapacitated voter's ballot or ballots."

It is to be noted that the application is made to the county clerk, or to the city or town clerk, and no mention is made of the clerk of the school district, and this becomes important when it is observed that the county clerk has the ballots printed for county wide election (Section 678, Revised Codes of Montana, 1935), Section as amended, and the city clerk has the ballots printed for municipal elections (Section 679, Revised Codes of Montana, 1935). Section 1224.11, Revised Codes of Montana, 1935, as amended by Chapter 178, Laws of 1939, states "the school district clerk shall cause ballots to be prepared for all such bond elections..." The conclusion to be drawn is that the application for an absent voter's ballot is addressed to the clerk having custody of the ballots and as the school district clerk is not mentioned no such application can be made to him.

All of the sections pertaining to absentee voting mention the county and city or town clerk, but do not name the school clerk who is the custodian of the bond election ballots. Section 989, Revised Codes of Montana, 1935, provides that the general election laws do not apply to school elections,

and this would suggest that the legislative intent was not to include school elections within the absent voter's law.

It is therefore my opinion that an absent voter's ballot for a school district bond election has not been authorized by our legislature and therefore the only ballots which may be counted at such election are those cast by qualified electors who are present at the polls and vote in person.

Sincerely yours,
R. V. BOTTOMLY
Attorney General

Opinion 216 - 1946

Held: An election to abolish a county high school shall be submitted to the registered voters of the county, without the requirement that their names appear on the assessment rolls. The poll books for such election are the same as those used for the election of county officers, without the requirement of the preparation or posting of a separate list.

November 1, 1946

Mr. Edison W. Kent
County Attorney
Granite County
Philipsburg, Montana

Dear Mr. Kent:

You have requested my opinion concerning the procedure to be followed in the conduct of the special election for the abolishment of the county high school. You ask if there are any special qualifications for the electors.

Section 1262.19 to 1262.25, Revised Codes of Montana, 1935, cover the manner of holding an election to abolish a county high school.

Section 1262.20, Revised Codes of Montana, 1935, states that the petition for abolishment of the county high school must be signed by 20% of the qualified electors "who are also assessed in their own names on the assessment books of the county for that year upon real or personal property." The qualifications of those eligible to vote on the proposition are to be distinguished from the qualifications of the signers of the petition to abolish, in that Sections 1262.21,

and 1262.23, Revised Codes of Montana, 1935, provide that the question of the abolishment of the county high school shall be submitted to the "registered voters." No qualification of being a taxpayer is included in the sections next above referred to concerning the right to vote on the abolishment of the high school.

You did not advise me the date your high school was established, but you will find that Chapter 76, Laws of 1913, sets out a procedure for the establishment of a county high school, and in that chapter it was provided that the petition for the creation of the high school must be signed by one hundred freeholders of the county, but the electors eligible to vote were "qualified electors" and there was no requirement that the voters on the question be freeholders. In other words, in the establishment of a high school, there was not the requirement that the elector be a freeholder although the latter were the only authorized persons who could, by petition institute the procedure for such an election.

Section 2, Article IX of the Montana Constitution, was amended in 1932 by the addition to the qualifications to vote that:

> "If the question submitted concerns the creation of any levy, debt or liability the person, in addition to possessing the qualifications above mentioned, must also be a taxpayer whose name appears upon the last preceding completed assessment roll, in order to entitle him to vote upon such question."

The question of the abolishment of the county high

school does not come within the above quoted portion of our constitution in that a debt or liability does not result from the abolishment of the high school.

Section 1262.23, Revised Codes of Montana, 1935, provides in part:

> ".....such question shall be submitted to the registered voters of the county at the ensuing general election in November, and the votes cast thereon canvassed and returns thereof made in the manner provided by law for the election of county officers at that election ...."

The above quoted indicates that the poll books used and the manner of conducting the election do not differ from the manner of electing county officers with the exceptions of the notice given under Section 1262.22 and the form of ballot as found in Section 1262.23.

It is therefore my opinion an election to abolish a county high school shall be submitted to the registered voters of the county, without the requirement that their names appear on the assessment rolls.

It is also my opinion the poll books for such election are the same as those used for the election of county officers, without the requirement of the preparation or posting of a separate list.

Sincerely yours,

R. V. BOTTOMLY,

Attorney General

Opinion 25 - 1947

Held: That the extra levy authorized by Chapter 274, Laws of 1947, for County High Schools may be submitted to the qualified electors of a high school building district under the provisions of Chapter 114 of the Political Code of the Revised Codes of Montana, 1935.

That the election submitting the question of an extra levy for county high schools in counties not divided into high school building districts must be held in conformity with the general election laws.

April 9, 1947

Mr. Robert F. Swanberg
County Attorney
Missoula County
Missoula, Montana

Dear Mr. Swanberg:

You have requested my opinion as to the procedure to be followed in submitting the question of a special levy for a county high school.

Chapter 274, Laws of 1947, authorizes a special levy for county high schools. The Act contemplates that the question shall be submitted to the qualified electors of a high school building district, when the county has been divided into high school building districts, Section 2 of Chapter 274, states that"the question of the special levy shall be submitted in high school building district at the regular election held in such high school building district, or special election called for that purpose." There is no regular election held in high school building districts as

they were created for construction purposes only, Section 1301.5 Revised Codes of Montana, 1935, and Chapter 275, Laws of 1947. However, the Act does provide for the calling of a special election by the board of trustees of said district. Sections 1219 to 1223, Revised Codes of Montana, 1935, provide a method and procedure for holding an election and submitting the question of a special levy to the qualified electors of a school district and such procedure would be adaptable to the election held in a high school building district.

The method of holding a special election in counties not divided into high school building districts offers a more difficult problem.

Section 2 of Chapter 274, Laws of 1947, provides in part:

> ".....Where a County High School has no building district, then such special levy may be submitted and voted upon on the date of the regular county school election, or at a special election called for that purpose by the board of county trustees of such county high school shall, by resolution in their minutes, state that such extra taxation levy is necessary for any of the purposes hereinabove mentioned."

There is no regular county school election as trustees of county high schools are appointed to their offices by the board of county commissioners with the exception of the county superintendent who is ex-officio a member. Section 1262.4, Revised Codes of Montana, 1935.

The only solution is to call a special election.

Sections 1219-1223, supra, are not applicable as such sections by their terms are operative in school districts. It must have been the intent of the legislature to utilize the general election laws in the procedure for such an election.

There is not designated by the codes any specific noticefor such a special election, except that Section #538, Revised Codes of Montana, 1935, requires that all questions submitted to the people of the county must be advertised for two weeks before the election.

In the absence of a more specific statute for such a special election, registration must be closed in accordance with the provisions of Section 566, Revised Codes of Montana, 1935, and the list of registered electors printed and posted as provided in Section 567, Revised Codes of Montana, 1935, as amended by Chapter 167, Laws of 1945.

The county clerk, by virtue of Section 686, Revised Codes of Montana, 1935, is authorized to prepare the necessary ballots whenever any question is submitted to the voters of a county. The ballot might well conform with the form found in Section 1222, Revised Codes of Montana, 1935.

As this is an election to vote upon the creation of a levy the eligible voters must be taxpayers whose names appear upon the last preceding complete assessment roll. Section 2 Article IX, Montana Constitution, and Section 544, Revised Codes of Montana, 1935.

It would seem that Chapter 114 of the Political Code of

the Revised Codes of 1935, which defines the procedure for an election to authorize a special levy in school district would be pertinent. This Chapter, however is limited to school districts. In Panchot v. Leet, 50 Mont. 315, 146 Pac. 927, our Court held that a county high school is county property and obligations incurred in behalf of the county high school are county obligations. It therefore follows that a levy for county high school purposes in a county not divided into high school building districts must be a county levy and in the absecnce of any prescribed procedure the election held in conformity with the general election laws pertaining to county wide elections.

However, the hours the polls shall be open are specifi--cally fixed by Chapter 2, Laws of 1937, and this Chapter must be followed.

In proceeding in this matter the Board of County Commissioners should keep in mind the dates of the preliminary and final budgets for high schools.

The levy provided by said election is only for the fiscal year following said election as the need for the funds must be determined in anticipation of the current budget.

It is apparent that the procedure suggested above is cumbersome, but the legislature did not see fit to fix a more satisfactory procedure.

It is therefore my opinion that the extra levy authorized by Chapter 274, Laws of 1947, for the county high schools may be submitted to the qualified electors of a high school building district under the provisions of Chapter 114 of the

Political Code of the Revised Codes of Montana, 1935.

It is also my opinion that the election submitting the question of an extra levy for county high schools in counties not divided into high school building districts must be held in conformity with the general election laws.

Sincerely yours,
R. V. BOTTOMLY
Attorney General

Opinion 99 - 1950

Held: 1. The School Trustees appointed to office after the creation of a new school district by consolidation and and change of classification of the district hold office until the next school election.

2. Where the terms of the five trustees of second class district expire at the next school election due to the fact they were appointees, five trustees should be elected at the election, one of whom shall serve for one year, two for two years and two for three years.

March 14, 1950

Mr. John M. Comfort
County Attorney
Madison County
Virginia City, Montana

Dear Mr. Comfort:

You have requested my opinion concerning the election of trustees in a school district of your county. You advise me that two third class districts were consolidated and a new district was formed and three trustees were appointed to serve until the next school election. Subsequently, the County Superintendent made an order changing the class of the district to that of a second class district and appointed two additional trustees.

Section 75-1813, Revised Codes of Montana, 1947, authorizes the consolidation of two or more adjacent school districts or the annexation of one or more districts to an existing district.

Only a third class district can be annexed by a second or first class district. Two third class districts can be

under the provisions of Section 75-1813, Revised

Codes of Montana, 1947, and a new district is formed. Sub-sections 4 and 5 of Section 75-1813 provide in part:

> ". . . If the order be for the formation of a new district, it shall specify the name and number of such district, and the County Superintendent shall appoint three (3) trustees to serve until the first Saturday in April succeeding.
>
> (5) At the regular election succeeding there shall be elected by the regularly qualified electors three (3) trustees, one of whom shall serve for one (1) year, one for (2) two years, and one for three (3) years. The election of trustees and terms shall be the same as for other districts under general school laws."

Your County Superintendent, in appointing three trustees for the new district created by the consolidation of the two third class districts followed the above quoted statute. The two trustees appointed by the County Superintendent, after the classification of the district was declared, were appointed in accordance with the provisionsof Section 75-1802, Revised Codes of Montana, 1947. This means that there are now five trustees who were all appointed to office.

The terms of office and the number of trustees to be elected are the problems which are presented under your unusual situation. Subsection 5 of Section 75-1813 quoted above would solve the problem if it were not for the fact the classification of the district has been changed from that of a th ird to a second class district. The appointment of two additional trustees presents a situation not contemplated in the first sentence of Sub-section 5 of Section 75-1813, Revised Codes of Montana, 1947. However, the second sentence directs that the general school laws shall apply in the election of trustees.

In the case of State ex rel. Kuhl v. Kaiser, et al. 95 Mont. 550, 27 (2d) 1113, the court held that Section 1001 Revised Codes of Montana 1921, (now Section 75-1617, Revised Codes of Montana, 1947) has no application to the election of trustees who have been appointed to office. Section 75-1617 is as follows:

> "When at any annual school election the terms of the majority of the trustees regularly expirein districts of the first class, three trustees, in districts of the second class, two trustees, in districts of the third class, one trustee, shall be elected for three years, and the remaining trustee or trustees whose terms expire shall hold over for one or two years as may be necessary to prevent the terms of a majority of the Board of Trustees expiring in any one year; provided, that it shall be determined by lot what trustee shall hold over, and for what term."

Opinion No. 61, Volume 16, Report and Official Opinions of the Attorney General followedthe Kuhl case under facts similar to those presented here and held that all trustees who received their office by appointment held office until the next school election at which time their terms expired and successors must be elected.

Sub-section 5 of Section 1613 contemplates that in the election of trustees for a district created by consolidation the trustees elected to office shall hold office for terms of 1, 2 and 3 years so that in any one year, there will be a majority of trustees hold over with experience so that the business of the school district can go on without interruption. This legislative policy is also expressed in Section 75-1617 and can be given recognition by electing one trustee for a term of one year, two for terms of two years and two for terms of three years. The method of selection of the terms for which candidates will stand for election can be

done by the nominating petitions filed with the clerk as provided in Section 75-1604, Revised Codes of Montana, 1947.

It is therefore my opinion that the school trustees appointed to office after the creation of a new school distric by consolidation and change of classification of the district hold office until the next school election.

It is also my opinion that where the terms of the five trustees of a second class district expire at the next school election due to the fact they were appointees, five trustees should be elected at the election, one of whom shall serve for one year, two for two years and two for three years.

Very truly yours,
ARNOLD H. OLSEN
Attorney General.

Opinion 25 - 1951

Held: Establishments holding retail beer and liquor licenses must be closed during the hours when the polls are open on the day of the annual election of school trustees and on the days of special bond elections.

June 27, 1951

Mr. R. M. O'Hearn
State Liquor Administrator
Helena, Montana

Dear Mr. O'Hearn:

You have requested the opinion of this office on the following question: "Must licensed retail beer and liquor establishments be closed during the hours the polls are open on (1) the day of the annual election of school trustees; (2) the day of the annual election in cities and towns; (3) days of special bond elections."

Section 4-414, R. C. M., 1947, provides that retail liquor establishments shall not sell, offer for sale or give away liquor at retail "on any day of a general or primary election during the hours the polls are open, excepting bond elections." Section 4-303, R. C. M., 1947, provides that licensed beer establishments shall be closed during the hours the polls are open "on any day of a general, primary, or special bond election." A retail liquor licensee must also be the holder of a retail beer license. Section 4-411, R. C. M., 1947. Section 4-303, R. C. M., 1947 is later legislation than Section 4-414, R. C. M., 1947 having been enacted as Section 1, Chapter 16, Laws of 1943, while Section 4-414 was enacted as Section 12, Chapter 84, Laws

1 /. A retail beer establishment, when "closed", must

be closed for all purposes, including the dispensing of liquor. See note 22 in 11 Corpus Juris at page 917, relating to definitions of "closed saloon". Obviously, an establishment licensed for the sale of beer or for the sale of beer and liquor at retail must be "closed" on a day of a special bond election during the hours the polls are open in view of the wording of Section 4-303, R. C. M., 1947.

A "general election" is one that recurs in each election precinct of the state on a day designated by law for the selec tion of officers. Arps. v. State Highway Commission, 90 Mont. 152, 162, 300 Pac. 549. A "general election" is also defined as one provided by law for the election of officers throughout the state or certain subdivisions thereof. 29 C. J. S. Elections, par. 1 (b). Election of school trustees occurs annually in each school district in the state under the requirement of Section 75-1603, R. C. M., 1947. Such elections are, therefore, "general elections" within the usually accepted meaning of the term. In the case of Ford v. Moss 124 Ky. 288, 98 S. W. 1015 it was held that school elections were general elections within the meaning of a statute prohibiting the sale of intoxicating liquor on "general election" days.

The elections held by cities and towns annually are not elections held in each and every voting precinct of the state and are not therefore "general elections". Therefore, Sections 4-303 and 4-414, R. C. M., 1947, do not require that establishments licensed to sell beer and liquor be closed during the hours the polls are open for such municipal

elections.

It is my opinion that establishments licensed for the sale of beer or liquor at retail must be closed during the hours the polls are open on (1) the day of the annual election of school trustees; (2) the day of any special bond election held in the voting district where the licensed establishment is located. Of course, there is no question but that such establishments shall be closed during the hours the polls are open on days of elections regularly recurring the first Tuesday after the first Monday of November in each even numbered year and the regular so-called "Primary election" held every other year on the third Tuesday of July.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 86 - 1952

Held: The names of deceased voters may not be deducted from the registration lists in determining the necessary forty per cent of the qualified electors voting on a bond proposition submitted at school district election.

May 20, 1952

Mr. Bert W. Kronmiller
County Attorney
Big Horn County
Hardin, Montana

Dear Mr. Kronmiller:

You have requested my opinion as to whether there may be deducted from the list of registered electors for a bond election the names of those who have died prior to election. You advise me that in determining the necessary forty per cent of the qualified electors, the election failed by two votes. You ask if the names of two deceased voters on the registration list may be disregarded.

Section 75-3912, Revised Codes of Montana, 1947, provides that at a school bond election "only qualified registered electors residing within the district who are taxpayers upon property therein and whose names appear upon the last completed assessment roll..... shall have the right to vote." This section also requires the county clerk to prepare lists of such registered electors and poll books for the use of the judges at the election.

Under the provision of Section 75-3914, Revised Codes of Montana, 1947, it is provided:

> "Whenever the question of issuing bonds for any purpose is submitted to the qualified electors of a school district at either a general or special school election

> not less than forty (40) per centum of the qualified electors entitled to vote on such question at such election must vote thereon, otherwise such question shall be deemed to have been rejected; provided, however, that if forty (40) per centum or more of such qualified electors do vote on such question at such election and a majority of such votes shall be cast in favor of such proposition, then such proposition shall be deemed to have been approved and adopted."

It is to be noted that forty per cent of the qualified electors must vote, otherwise the proposition will be considered rejected. As Section 75-3912 requires the voters to be registered and makes it the duty of the county clerk to prepare lists of the registered electors, it is reasonable to assume that the forty per cent must be determined on the basis of the list prepared by the county clerk. The Supreme Court of Georgia, in several cases, considered a similar question as presented here, and held that where a majority must be computed on the basis of registration lists that the courts may not deduct disqualified voters from the list in order to determine whether a majority has favored the proposition submitted. Chapman v. Sumner Consolidated School District, 152 Ga. 452, 109 S. E. 129; Fairburn School District v. McClarin, 166 Ga. 867, 144 S. E. 765; and Calloway v. Tunnell Hill School District, 51 Ga. App. 101, 179 S. E. 737.

The purpose of the requirement of a forty per cent vote is to set a standard for public interest in the election and it is not designed to disenfranchise qualified electors, but to assure that the taxpayers will not be subjected to payment of bonds approved by the very small number of qualified electors within a school district.

It is, therefore, my opinion that the names of deceased voters may not be deducted from the registration lists in determining the necessary forty per cent of the qualified electors voting on a bond proposition submitted at a school district election.

Very truly yours,
ARNOLD H. OLSEN
Attorney General

Opinion 33 - 1955

Held: The defeat of the question to change the site of a school house in a third class district does not preclude a second election in less than three years time resubmitting the question of change of site.

August 5, 1955

Mr. Roy W. Holmes
County Attorney
Carter County
Ekalaka, Montana

Dear Mr. Holmes:

You have requested my opinion as to whether a second election may be held on the question of changing a school house site in a third class district within a period less than three years after an election at which the majority voted against the change of site.

Section 75-3101, Revised Codes of Montana, 1947, authorizes an election in a third class district to vote upon the question of selection of a school site in a third class district with the limitation "that any sites so changed cannot again be changed within three years from the date of such action."

It is apparent that where the question of selecting a new site is rejected by the voters there has been no change of site. In 14 C. J. S. 397, the text defines change as meaning ".....to alter or make different, to exchange, to put one thing in the place of another, or to render something essentially different from what it was...". If the present location of a school is rejected by the electors and a new site selected, then there would be a change in site. In School District No. 6, 110 Kan. 317, 203 Pac.

718, this distinction was recognized.

The limitation of the statute is directed to the avoidan of too frequent changes of location of schools and not to multiplicity of elections. In a recent Montana case, Schmied kamp vs. School District No. 24, Mont. 278 Pac. (2d) 584, the court recognized that,

> "...The defeat of a proposition to issue bonds does not prevent a second submission of the proposition, whereas a proposition to issue bonds which has been adopted by the voters ordinarily cannot be resubmitted in the absence of statutory authority."

The above quoted is analogous to the question submitted by you.

It is therefore my opinion that the defeat of the question to change the site of a school house in a third class district does not preclude a second election in less than three years time resubmitting the question of change of site.

Very truly yours,

ARNOLD H. OLSEN

Attorney General

CHAPTER REFERENCES

The following official opinions of the attorney general can be found in Volume 21 of the Report and Official Opinions of the Attorney General.

Opinion 131 - 1946
Opinion 214 - 1946
Opinion 216 - 1946

The following official opinion of the attorney general can be found in Volume 22 of the Report and Official Opinions of the Attorney General.

Opinion 25 - 1947

The following official opinion of the attorney general can be found in Volume 23 of the Report and Official Opinions of the Attorney General.

Opinion 99 - 1950

The following official opinions of the attorney general can be found in Volume 24 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 25 - 1951
Opinion 86 - 1952

The following official opinions of the attorney general can be found in Volume 26 of the Report and Official Opinions of the Attorney General: (To be published)

Opinion 33 - 1955

Opinion 118 - 1946

Held: The trustees of a second class school district have the power to purchase two lots adjoining a grade school for playground purposes without submitting the question to a vote of the electorate.

2. School trustees may enter into a contract for the purchase of additional land adjoining a school site and the purchase price paid by an appropriation provided in the next ensuing budget or the purchase price may be paid in installments by provision contained in three successive budgets.

3. A school board of the first or second class may not build a school house, or purchase or locate a school site unless directed so to do by a majority of the electors of the district voting at an election as provided in Section 1015.8, Revised Codes of Montana, 1935, as amended by Chapter 165, Laws of 1937.

January 29, 1946

Mr. Wilbur P. Werner
County Attorney
Glacier County
Cut Bank, Montana

Dear Mr. Werner:

You advise me that a second class school district in your county contemplates the purchase of two lots which adjoin the present school property for playground purposes.

You ask specifically the following questions:

> Can the trustees of School District No. 15 purchase the lots as additional playgrounds or as a possible

additional grade school site without an election authorizing them to do so?

If the school board can purchase the lots with or without authorization from the electorate, can they set up in their budget for the years 1946-47 a sufficient sum to purchase them or should they have a bond election for the purchase of them? If they purchase them under their budget would it not be permissable to make the purchase price payable over a three-year period?

If the lots are not purchased and it is decided to build a grade school in the north part of town away from their present grade school, would it be necessary to submit to the electorate the site that the new grade school would be built upon?

Your first question is answered by Section 1015, Revised Codes of Montana, 1935, as amended by Chapter 165 Laws of 1937, which provides in part as follows:

"Every school board unless otherwise specifically provided by law shall have power and it shall be its duty:.....
"8. To purchase, acquire, sell and dispose of plots or parcels of land to be used as sites for schoolhouses, school dormitories and other school buildings, and for other purposes in connection with the schools in the district, and to sell and dispose of the same; provided, that they shall not build or remove schoolhouses or dormitories, nor purchase, sell or locate school sites unless directed so to do by a majority of the electors of the district voting at an election held in the district for that purpose, and such election shall be conducted and votes canvassed in the same manner as at the annual election of school officers, and notice thereof shall be given by the clerk by posting three notices in three public places in the district at least ten days prior to such election, which notices shall specify the time, place and purpose of such election. Provided further, that this subdivision shall not be so construed as to prevent the board of trustees from purchasing one or more options for a school site." (Emphasis mine)

The above quoted permits the trustees "to purchase... parcels of land for other purposes in connection with the schools of the district." From the facts given, it appears that the trustees contemplate the enlargement of the school

grounds by purchase of adjoining lots, and not the selection of a school site. In 58 C. J. 740, the word "site" is defined as follows:

"A plot of ground suitable or set apart for some specific use; a seat or ground plot. The term does not of itself necessarily mean a place or tract of land fixed by definite boundaries."

Our codes use the word "site" as above defined; that is, in the sense that it means a general location for a specific purpose, but not in the sense that the boundaries are fixed. An enlargement of the school grounds would not constitute a change in the site, and thus necessitate submission of the question to the voters at an election.

Your first question also states that the two additional lots together with the lots the school district now owns may be used for the construction of a new grade school building. Subsection 8 of Section 1015, supra, provides that the construction of a new building shall be submitted to the voters and also the selection of a school site shall likewise be submitted. Authorization for the trustees to build a school building and the selection of the site for the same must be given by the electors at an election held for that purpose.

Section 1019.3, Revised Codes of Montana, 1935, which is a part of the budget act for school districts, provides for "new building and alterations." While this item does not specifically mention the purchase of additional land, yet it is broad enough to cover such a purchase. If the district may allocate funds under this item for the fiscal year 1946-

1947 sufficient to make the purchase without exceeding the funds available for the year, and without depriving some other items of the budget of necessary funds, it would be within its power. Also the district could enter into a contract of purchase and agree to pay the purchase price over a period of three years. The trustees, having the power to make such a purchase, may enter into a contract for the best interest of the district. An analogous situation is the case of Bennett v. Petroleum County, 87 Mont. 436, 288 Pac. 1018, in which case our court held that the commissioners having the power to lease county buildings may enter into a lease for a term of four years although such a lease would extend beyond the term of the commissioners entering into the lease. The court did not direct its attention to the fact the lease would create an obligation to be met in future budgets, but such would be the effect, as would the plan of purchase under consideration here. The limitation of indebtedness, Section 6 of Article XIII must be observed in the incurring of this indebtedness.

Your third question is answered by subsection 8 of Sectic 1015, Revised Codes of Montana, 1935, as amended, which is the applicable statute for the acquisition of a new school site by a second class district. Nichols v. School District, 87 Mont. 181, 287 Pac. 624, held that Section 1014, Revised Codes of Montana, 1921, had been amended by Chapter 122, Laws of 1923. Section 1014, appears in the 1935 Codes as giving the power to trustees in first and second class districts to change or select school sites, but the Nichols case would control. It would, therefore, be necessary to submit the ques-

tion of the sale of the school site and also the question of the location and purchase of a new school site to a vote of the qualified electors.

It is therefore my opinion that:

1. The trustees of a second class school district have the power to purchase two lots adjoining a grade school for playground purposes without submitting the question to a vote of the electorate.

2. School trustees may enter into a contract for the purchase of additional land adjoining a school site and the purchase price paid by an appropriation provided in the next ensuing budget or the purchase price may be paid by installments by provision contained in three successive budgets.

3. A school board of the first or second class may not build a school house or purchase or locate a school site unless directed so to do by a majority of the electors of the district voting at an election as provided in Section 1015.8, Revised Codes of Montana, 1935, as amended by Chapter 165, Laws of 1937.

Sincerely yours,
R. V. BOTTOMLY
Attorney General

Opinion 132 - 1946

Held: At a joint meeting of a board of trustees of a county high school and a district high school which acts upon the question of the employment of a district superintendent and county high school principal, the board of trustees of the county high school shall have the number of votes at said meeting equal to the number of votes of the board of trustees of the school district.

March 6, 1946

Mr. Seth G. Manning
County Attorney
Wibaux County
Wibaux, Montana

Dear Mr. Manning:

You requested my opinion concerning the following facts:

> The seven trustees of the Wibaux County High School met with the five trustees of the School District No. 6 as a joint board on the 16th day of January, 1946. The county superintendent of schools was also in attendance at the meeting. All of the trustees present voted on the question of rehiring the incumbent of the combined office of superintendent of school district No. 6 and principal of the county high school. The vote cast was nine votes not to rehire and three votes to rehire the present incumbent. The chairman of the board gave notic to the incumbent that his contract would not be renewed. You asked what the effect is of the action taken.

Section 1262.61, Revised Codes of Montana, 1935, provides for the organization of a joint meeting of the two boards and states in part as follows:

> "For the purpose of voting upon any question relative to the employment of a district superintendent and county high school principal, or to the employment of joint teachers, or of determining any question of joint administrative policy, or of apportioning any item of joint expense, the board of trustees of the school district and the board of trustees of the county high schoo shall each be entitled to the same number of votes at any meeting of the joint board. To this end the board of trustees of the county high school shall choose a

> number of its members equal to the number of members of the school district which comprise its board. The county superintendent of schools shall not be one of the trustees so selected by the county high school board. The names of the trustees, so chosen by the county high school board, shall be given to the secretary of the joint board as the designated representatives of the board of trustees of the county high school who are entitled to vote at all meetings of the joint board."

It is to be noted in the foregoing quoted provision of our law the Board of Trustees of the County High School shall have the same number of votes as the Board of Trustees of the School District. In this case it would mean the Board of Trustees of the County High School would have five votes. From the facts you gave me it is apparent all of the trustees of the County High School voted at the meeting and thus violated the above section of our code.

In 14 American Jurisprudence 323 the text states:

> "If the statute requires a particular procedure in elections of administrative officers by a school board, it must be strictly adhered to, and the mere unanimity of the choice will not validate an election in which the statutory requirements were ignored..."

In 56 Corpus Juris 334 it is stated:

> "A board of education, or of directors, trustees, or the like, of a school district or other local school organization can exercise its powers in no other mode than that prescribed or authorized by statute..."

The foregoing authorities make it the duty of the boards to conform to the statutory procedure, which obviously was not done.

In McNair v. School District No. 1, 87 Mont. 423, 288 Pac. 188, our Supreme Court said:

> "The board of trustees, therefore, constitutes the board of directors and managing officers of the corporation, and may exercise only those powers expressly conferred upon them by statute and such as are necessarily implied in the exercise of those expressly con-

ferred. The statute granting power must be regarded both as a grant and a limitation upon the powers of the board."

A school board must act in conformity with the statute granting the power which in this instance was not done. Since the legislature has prescribed a specific and mandatory procedure to be followed, that procedure and no other -- will meet the legislature's requirements.

It is therefore my opinion that, at a joint meeting of a board of trustees of a county high school and a district high school which acts upon the question of the employment of a district superintendent and county high school principal, the board of trustees of the county high school shall have the number of votes at said meeting equal to the number of votes of the board of trustees of the school district; and in the event all the members of the board of trustees of the county high school are permitted to vote, then said meeting and the action taken thereat is of no effect and not in conformity with Section 1262.61, Revised Codes of Montana, 1935.

Sincerely yours,

R. V. BOTTOMLY

Attorney General

Opinion 136 - 1946

Held: In school districts of the first class, where but one public meeting is held, and only one candidate be nominated for each term to be filled, then and in that event no election need be held and the clerk of such district shall certify such facts to the board of trustees of the district, acting as a board of canvassers who shall thereupon certify the election of such persons to the county superintendent of schools.

March 16, 1946

Mr. Horace J. Dwyer
County Attorney
Deer Lodge County
Anaconda, Montana

Dear Mr. Dwyer:

I am in receipt of a copy of the opinion you rendered to Mr. G. A. Peterson, Clerk of School District No. 10, Deer Lodge County, Anaconda, Montana. As I understand it, the facts are as follows:

> On February 18, 1946, the board of education called a mass meeting in the junior high school auditorium at 7 o'clock P.M. for the purpose of nominating school trustees to fill two vacancies. Five persons were nominated; then a ballot was cast and the two receiving the ghighest number of votes were declared the two nominees. You now inquire as to whether all five names should appear on the election ballot or just the names of the two candidates nominated.

Section 1 of Chapter 130, Laws of 1945, governs elections in districts of the first class as to nominations and conducting of elections. Said Section 1, insofar as the same is pertinent here, reads as follows:

> "In districts of the first class, no person shall be voted for or elected as trustee unless he has been nominated therefor at a bona-fide public meeting, held in the district not more than sixty (60) days nor less [illegible]orty (40) days before the day of election, and at at least twenty (20) qualified electors were present, chairman and secretary were elected, and a certificate of such nomination setting forth the place where

> the meeting was held, giving the names of the candidates in full, and if there are different terms to be filled, the term for which such candidate was nominated, duly certified by the chairman and secretary of such meeting, shall be filed with the district clerk within 10 days after such public meeting... In the event there be held only one (1) such public meeting, and only one (1) candidate be nominated for each term to be filled then and in that event no election need be held and the clerk of such district shall certify such facts to the board of trustees of the district, acting as a board of canvassers who shall thereupon certify the election of such persons to the county superintendent of schools."

As I understand the facts, the public meeting held on February 18th was for the purpose of nominating two candidates for the office of school trustees for two terms to be filled. The names of five candidates were placed in nomination. Thereupon the ballot was cast and the two persons receiving the highest number of votes were declared to be the nominees of that particular public meeting. In this event, the names of the two nominees for the two terms to be filled would ordinarily go upon the election ballot. However, inasmuch as there are but two terms to be filled and but two candidates nominated and only one public meeting held, there would be no need of holding an election, as the last part of Section 1 of said Chapter 130, supra, provides;

> "In the event there be held only one (1) such public meeting and only one (1) candidate be nominated for each term to be filled then and in that event no election need be held and the clerk of such district shall certify such facts to the board of trustees of the district, acting as a board of canvassers who shall thereupon certify the election of such persons to the county superintendent of schools."

Therefore, it is my opinion that in school districts of the first class, where but one public meeting is held and only one term to be filled(as in this instance), then and in that event no election need be held and the clerk of such district

shall certify such facts to the board of trustees of the district, acting as a board of canvassers who shall thereupon certify the election of such persons to the county superintendent of schools.

Sincerely yours,

R. V. BOTTOMLY ,

Attorney General

Opinion 179 - 1946

Held: A school trustee is not precluded from holding such office because he is not registered to vote and the residence of such trustee must be determined from the facts in accordance with the rules of Section 574, Revised Codes of Montana, 1935.

July 6, 1946

Mr. Chester E. Onstad
County Attorney
Powder River County
Broadus, Montana

Dear Mr. Onstad:

You have requested my opinion concerning the eligibility a school trustee to hold office. You advise me the trustee in question maintains a home in Wyoming and owns a large ranch in Montana. You also state he was a registered voter in Wyoming for the 1944 election and is not now registered to vote in Montana.

The qualifications for holding public office are prescribed by the Constitution and legislative enactment. Section 11 of Article IX of the Montana Constitution provides:

"Any person qualified to vote at general elections and for state officers in this state, shall be eligible to any office therein except as otherwise provided in this constitution, and subject to such additional qualifications as may be prescribed by the legislative assembly for city offices and offices hereafter created."

The qualifications for electors at school elections are found in Section 1002, Revised Codes of Montana, 1935, as amended by Chapter 83, Laws of 1939, and Chapter 65, Laws of 1941, which provides:

"Every citizen of the United States of the age of twenty

> one years or over who has resided in the State of Montana for one year, and thirty days in the school district next preceding the election, may vote thereat.'

The qualifications of a school trustee are found in Section 985, Revised Codes of Montana, 1935, which reads as follows:

> "Any person, male or female, who is a qualified voter at any election under this act, shall be eligible to the office of school trustee in such district."

In the facts which you submitted for my consideration, you stated the trustee whose right to hold office is questioned is not registered to vote in the State of Montana.

Our Supreme Court in the case of State v. Furnish, 48 Mont. 28, 134 Pac. 297, said:

> "It is a principlelong established that registration is no part of the qualifications of an elector and adds nothing to them; it is merely a method of ascertaining who the qualified electors are, in order that abuses of the elective franchise may be guarded against."

The Supreme Court of Nevada had under consideration the same question, and held:

> "... that if, by the expression 'qualified voters' the legislature of 1939 had intended that registration be required (as a qualification of holding office) they would naturally have used the word 'registered' as was done, for example, by the legislature of North Carolina when the words 'qualified registered voters' were employed..." (Gilbert v. Breithaupt, 60 Nev. 162, 104 Pac. (2d) 183.)

Meffert v. Brown, 132 Ky 201, 116 S. W. 779, 780, 1177.

42 American Jurisprudence, page 918.

From the foregoing it would appear to me that the fact the trustee is not registered to vote would preclude him from voting but will not disqualify him from being elected to and holding the office if otherwise a qualified voter. However, Section 1002, as amended, requires that electors must have

resided in the State of Montana for one year and in the school district for thirty days. Any person eligible to hold the office of trustee must meet such residence requirements. This raises a question of fact.

Section 574, Revised Codes of Montana, 1935, sets out rules for determining the place of residence for the purpose of voting. Subsection 4 of Section 574 states that a person who leaves the home to go into another state or district for temporary purposes does not lose his residence "provided he has not exercised the right to the election franchise in said state or district." If the trustee in question voted at the election in Wyoming in the year 1944 his residence in Montana could only be acquired subsequent to that date.

Under the rules set out in Section 574, it was necessary for the trustee to move to Montana with the intent to remain there as a resident which is a question of fact to be determined from all the evidence available.

It is therefore my opinion that a school trustee is not precluded from holding such office because he is not registered to vote and that the residence of such trustee must be determined from the facts in accordance with the rules of Section 574, Revised Codes of Montana, 1935.

Sincerely yours,

R. V. BOTTOMLY

Attorney General

Opinion 15 - 1947

Held: Board of school trustees may enter into contracts with teachers at any time during the year, except as restricted. Board of school trustees has only such powers and authority as granted by statute, or reasonably implied, but has wide discretion in exercising same. When Board finds anticipated expenditures for year exceed anticipated revenue from authorized levy and other sources, it is its duty to submit question of an extra levy to electors of the district as provided by law.

February 22, 1947

Mr. James D. Freebourn
County Attorney
Silver Bow County
Butte, Montana

Dear Mr. Freebourn:

You have submitted to this office your opinion rendered to the Board of Trustees of School District No. 1, Silver Bow County with reference to the duties and powers of the board, and particularly to the duties and powers of entering into contracts with teachers.

Your opinion has quite fully covered the law applicable to the questions presented, and after careful consideration and study of the opinion I am glad to concur therein.

In determining the powers and duties of a school board we must keep in mind the rule laid down by our Supreme Court in many cases, to the effect that such boards have no powers except those expressly granted, or necessarily implied from those granted (McNair v. School District No. 1 of Cascade County, 87 Mont. 423 288 Pac. 199.) With this rule of law in mind the questions submitted to you and considered in your opinion will be considered in the same order in this opinion.

1. Is it legal for the board to enter into contracts with the teachers at the present time for the school year 1947-1948?

Section 1015, Revised Codes of Montana, 1935, as amended by Chapter 103, Laws of 1943, dealing with powers of boards of trustees, provides, insofar as applicable here:

> "2. To employ or discharge teachers...and to fix and order paid their wages.... All contracts of employment of teachers authorized by proper resolution of a board of trustees shall be in writing and executed in duplicate by the chairman and clerk of the board, for the district and by the teacher."

Section 1075, Revised Codes of Montana, 1935, provides in part as follows:

> "After the election of any teacher or principal for the third consecutive year in any school district in the state, such teacher or principal so elected shall be deemed re-elected from year to year thereafter at the same salary unless the board of trustees shall by majority vote of its members on or before the first day of May give notive in writing to said teacher or principal that he has been re-elected or that his services will not be required for the ensuing year: provided that nothing in this act shall be construed to prevent re-election of such teacher or principal by such board at an earlier date...." (Emphasis mine.)

With reference to the specific question, these are the only statutes applicable and clearly give the trustees the power and duty to enter into contracts of re-employment with the teachers and principals who have been employed for three years or more at any time with the provision, of course, that if any such teacher is not notified prior to May first his services are not required, he is deemed re-employed for the ensuing year at the same salary. It is likewise made the duty of the trustees to enter into written contracts with these teachers. Having the power to fix and order paid the wages or salaries of teachers employed by the board as provided in Section 1015, supra, the board therefore has the

power to fix the salary and provide for the same in the contrac at any time.

The second question present is: "Should the board enter into a contract with the teachers at this time on the anticipation that the amount would be voted as a special millage by the people of the district in the election in April, and the people failed to so vote, would the contract still be binding upon the district?"

I fully agree with your opinion that this question, as to whether the board should enter into such a contract, is a question of administrative discretion with which the board is vestive and determinative only by the board itself. As to whether the board has authority to enter into such a contract, we may again look to the statutes to find such authority.

The board is given the power and duty to employ and discharge teachers and to fix their salaries. (Section 1015, Revised Codes of Montana, 1935, supra). Aside from the restrictions as to employment of teachers prior to May 1, there are no restrictions on the power of the board in the hiring of teachers or fixing salaries.

In the provisions of the statutes dealing with the preparation, submission and final adoption of school budgets, we find the following language in Section 1019.13, Revised Codes of Montana, 1935:

> "... provided further that if any contract has been entered into between the board of trustees of any school district and any teacher, principal or other person, by the terms of which contract such teacher, principal or other person has been employed for the school year for which the preliminary budget has been
> d, or when any teacher or principal, by reason
> oyment during the last school year, is entitled
> he provisions of Section 1075, to retain his

> position and salary during the school year for which the preliminary budget was prepared, the board of school budget supervisors must not make any change in any item for salaries or wages which will reduce or in any manner affect the salary or wages of such teacher, principal or other person."

As stated in your opinion, therefore, the law is clear that, apart from the restrictions imposed by Section 1075, the board may at any time hire teachers and fix salaries and terms by written contract, and from the time of the execution of the contract, the amount of such salary must be inserted in the budget and cannot be changed. The contract becomes a binding obligation of the district. That the board has the implied if not the granted power to fix the salary at any figure it deems advisable, within its reasonable discretion, is apparent from the further provisions of the statute providing for the submission of an extra levy to a vote of the people in the event the proposed expenditures approved in the budget will exceed the anticipated revenue.

Section 1019.7, Revised Codes of Montana, 1935, which is a part of the chapter of the Code on the preparation, submission and approval of the budget, provides in part:

> "... the board must determine and make an estimate of the amount of such deficiency and the number of mills of additional levy required to be made to meet and take care of such deficiency and must call an election .... for the purpose of obtaining the approval of the qualified electors..."

This section then provides for the time when such election may be held.

It would appear, therefore, from these provisions of the statute that the legislature contemplated that at some time the estimated expenditures of a district would exceed the estimated revenue to be derived from the authorized levies, and

all other sources, and therefore provided means of meeting such situation by enacting Section 1019.7, supra. It may be reasonably inferred the legislature contemplated such a deficiency might be caused by an increase in salary from the fact that it made it the duty of the board to enter into written contracts with the teachers and provided there should be no reductions in the budget of the amount fixed in such contracts.

From the express authority given the board to enter into written contracts as to term and salary, and the prohibition against the reduction the amount of salaries so fixed in such contracts, together with the provisions for the submission of the question of an extra levy to a vote of the people in the event of a deficiency in the budget, it would appear that the only considerations of the board in fixing the amount of salaries to be paid the teachers should be reasonableness of the amount based upon a fair and just remuneration for the services under the existing economic conditions.

The third question presented is: "Would it be possible to make a contract in such a way that it would be binding if the people voted the money but not binding if the people failed to vote it?"

As has been pointed out, the board has power and it is made its duty to enter into contracts with the teachers as to terms and salary. Having the power to contract with the teach the board may contract as to any conditions not restricted by law. I find no law preventing the board from entering into a conditional contract such as suggested in your question. Like any other contract, the terms thereof depend upon the agree-

ment of the parties and, unless such terms, or any thereof, are prohibited by law become binding upon both parties.

The fourth question present is: "Are the individual board members personally responsible for the contracts they enter int if the people of the district fail to vote proper millage to cover the amount designated in the contracts?"

I assume by this question is meant -- are the members of the board individually liable to pay the amount of the salaries contracted for in the event the electors fail to authorize the extra millage.

A board of school trustees is a body politic and may act only as a body and not individually. Only such contracts as are entered into by the board acting as such in meeting duly assembled are binding upon the district. When contracts are entered into in such manner they become the contracts of the district and not of the individual members, and hence only the district is liable thereon. State ex rel School District No. 29, Flathead County v. Cooney, 102 Mont. 521, 59 Pac. (2d) 48. School District No. 2 of Silver Bow County v. Richards, 62 Mont. 141, 205 Pac. 206. McNair v. School District No. 1 of Cascade County, 87 Mont. 423, 288 Pac. 188.

Hence, if the contract in question is entered into by the board acting as such in meeting duly assembled, the board havin the power to enter into such contract, in the absence of fraud, such contract is binding upon the district and the individual members may not be held liable therefore.

The board of trustees of a school district having only suc powers and authority as the legislature has given it, may act only within such powers. It is the duty and obligation of a

board of trustees toexercise such powers and such authority reasonably and for the best interests of the district. In the present instance it is the duty of the board to negotiate a contract with the teachers which is just, equitable and reasonable both for the teacher and the district, based upon the economic conditions presently existing. If the amount contracted for salaries on this basis, together with other anticipated expenditures of the district, exceeds the anticipated revenue from the authorized millage and other sources, it is the duty of the board under the provisions of Section 1019.7, supra, to determine the amount necessary to cover the deficit and to submit the question of levy of such extra millage necessary to the voters of the district. The trustees are not bound to conjecture as to the result of such election. When the question is submitted to the electors the boards' duty has been performed and the matter is then left to the electors.

It is therefore my opinion:

1. A board of school trustees may enter into contracts with teachers at any time during the year, except as restricted by the provisions of Section 1075 Revised Codes of Montana, 1935.

2. A board of school trustees has only such powers and authority as is granted it by statute, or which are reasonably implied from those granted, but has a wide discretion in honestly and fairly exercising such powers and authority.

3. When the board finds that the anticipated expenditures for the year exceed the anticipated revenue from the authorized levy and other sources, it is its duty to submit the question of an extra levy to the electors of the district as provided by law.

4. Members of a board of school trustees are not liable individually for any contracts or acts done by the board acting as such in meeting duly noticed and assembled.

Sincerely yours,

R. V. BOTTOMLY

Attorney General

Opinion 23 - 1947

Held: That the failure of a school trustee to qualify within the time fixed does not of itself create a vacancy in the office and this his qualification prior to an appointment to the office precludes there being any vacancy in the office.

April 8, 1947

Mr. Robert F. Swanberg
County Attorney
Missoula County
Missoula, Montana

Dear Mr. Swanberg:

You have requested my opinion as to whether there is a vacancy in the office of school trustee resulting from the failure of the trustee elected to file his oath of office within fifteen days from the time he received notice of election and the blank oath of office from the clerk. You advised me that the trustee was elected to succeed himself.

Section 997, Revised Codes of Montana, 1935, provides:

> "Trustees elected shall take office immediately after qualifying, and shall hold office for the term of three years except as elsewhere expressly provided herein, and until their successors are elected or appointed and qualified.
>
> The clerk of the district shall, at the time of issuing certificate of election to a person elected as trustee, deliver to such person a blank oath of office. Every trustee shall file his oath of office with the county superintendent of schools within fifteen days of the receipt of the certificate of election and blank oath of office from the clerk. Any trustee failing to qualify as herein provided shall forfeit all rights to his office and the county superintendent of schools shall appoint to fill the vacancy caused thereby."

From the above quoted code section it appears that the failure to file the oath of office within fifteen days from the date of the receipt of the certificate of election and blank oath of office may result in a vacancy in the office.

In State ex rel Wallace v. Callow, 78 Montana 308, 254 Pac. 187, our court considered Section 511, Revised Codes of 1921, which provides in part that an office becomes vacant upon the refusal or neglect to file the official oath or bond within the time prescribed. Under the facts in the case a proper bond was not filed and an appointment made, with the result that the appointee received the office. The court in considering Section 511, which is similar to Section 997, said

> "As courts are required to construe statutory provisions in accordance with the legislative intent, it is held that the word 'vacancy', as used in such statutes, is not to be considered in its literal sense, it is ordinarily given a more liberal figurative meaning conforming to the intention of the lawmaker and the purpose to be accomplished; ... that 'within the meaning' of a statute identical with ours, such officer-elect is to be considered an 'incumbent' of the office to which hehas been elected; ... and, while the statute is not self executing, the declaration of the proper authority, after the expiration of the statutory period and before qualification by the officer elect, creates a 'vacancy' in th office on the commencement of the term to which such officer is elected."

It is to be noted that the court held the statute not to be self-executing and that a vacancy is created by the "declar tion of the proper authority, after the expiration of the stat tory period and before qualification by the officer-elect." I other words if the officer files his oath before an appointmen is made, even though after the prescribed time, there is no vacancy. Also in the Callow case, the court quoted with approval from a leading text the following:

> "These provisions as to time, though often couched in most explicit language, are usually construed to be directory only and not mandatory; ... a failure to give bond within the time prescribed does not therefore, ipso facto work a forfeiture, ... even though the statute expressly provides that upon a failure to give the bond within the time prescribed, the office shall be deemed vacant and may be filled by appointment."

In State ex rel Nagle v. Stafford 99 Montana 88 43 Pac. (2nd) 636, our court again considered Section 511 and held that the failure to file a bond would preclude the incumbent from holding an office claimed by an appointee whose appointment had been confirmed by the Senate. The Court recognized the rule that the vacancy occurs upon the appointment and its confirmation as the court said:

> "Such a vacancy may be filled by the official authorized to do so as soon asit occurs, as the appointing power is plenary, but where, as here, confirmation is necessar the appointment is not effective to oust the incumbent until the new appointee is confirmed."

The text in 42 Am. Jr. 978 states in regard to a statute providing for forfeiture of an office for failure to qualify within the time fixed as follows:

> "The object of such provisions is accomplished, it is said by holding that a faulure to qualify does not in itself work a forfeiture of the party's right to office, but simply authorizes the proper authority to declare such forfeiture and fill the office by appointment."

From the facts you gave, no appointment has ever been made and in particular none was made during the time the trustee wa in default for failure to file his oath of office.

It is therefore my opinion that the failure of a school trustee to qualify within the time fixed does not of itself create a vacancy in the office and that his qualification prio to an appointment to the office precludes there being any vacancy in the office.

Sincerely yours,

R. V. BOTTOMLY

Attorney General

Opinion 55 - 1947

Held: (1) A Board of Trustees of a school district may set up a school in a church building for temporary use and to meet an emergency. The selection of a permanent school site and the construction of a school building must be authorized by the qualified electors of the district at an election called for that purpose, within a reasonable time.

(2) School trustees must purchase and furnish textbooks for the use of the schools in their districts.

(3) School trustees must hire a teacher or teachers for the schools in their districts even though the teachers will be employed in a new school temporarily located.

August 11, 1947

Mr. Melvin E. Magnuson
County Attorney
Lewis and Clark County
Helena, Montana

Dear Mr. Magnuson:

You have advised me that, in school district No. 27, the school building and the school site were previously sold. Since the sale, a colony of Hutterites have moved into the district and wish to have a public school established. You also state the Hutterites have offered the use of their church for school purposes for the next school year. The questions which you submitted are as follows:

(a) May the school trustees temporarily set up a public school in the church building owned by the Hutterites, which is located upon the private property of the Hutterites?

(b) Must the school trustees furnish free textbooks for the conduct of such a school?

(c) Must the school trustees furnish a teacher for the conduct of such a school?

The Montana Constitution makes it the duty of the legis-

lature to provide for schools. Our Supreme Court, in Grant v. Michels, 94 Mont. 452, 23 Pac. (2d) 266, considered the constitutional provision and said:

> "Section 1 of Article XI of the Constitution declares that 'it shall be the duty of the legislative assembly of Montana to establish and maintain a general, uniform and thorough system of public, free, common schools.' This is a 'solemn mandate' to the legislature for the purpose of insuring to the people the system described. (Evers v. Hudson, 36 Mont. 135, 92 Pac. 462.) This mandate was obeyed by the legislature in the enactment of laws setting up the machinery for the creation and maintenance of school districts throughout the state.. The number, location and extent of the districts within a county must, of course, be, and is by law, left to local option and governed by circumstances;....."

It is apparent from the above quoted that the maintenance of schools within the state is of paramount importance. In Section 1015, Revised Codes of Montana, 1935, as amended it is made the duty of trustees to employ teachers, to provide school furniture and to acquire school houses. The selection of a school site must be done under the direction of a majority of the electors. However the problem wh ich you present is not the selection of a permanent school site or school house, but the selection of a temporary school house to meet what amounts to an emergency. In State ex rel. Bean v. Lions, 37 Mont. 354, 96 Pac. 922, our Court held:

> "It may well be that in cases of emergencies, and for temporary purposes until electors may be consulted the trustees might move the school."

A similar conclusion was reached by this office in Volume 7, Report and Official Opinions of the Attorney General, page 157, wherein it was held:

> "A Board of Trustees has the authority to employ a teacher, furnish books, and temporarily maintain a new school without a vote of the electors. This would not include the right to locate a permanent site for the school house."

It must be kept in mind that such a school is of a temporary nature, to meet an emergency, and that a permanent site for the school house must be authorized by the qualified electors of the district within a reasonable time. Also, the school will be a public school conducted under the laws of the State of Montana.

The question of furnishing free textbooks is answered by Section 1198, Revised Codes of Montana, 1935, which makes it the duty of all school boards to purchase textbooks for the use of the pupils in attendance at their schools.

I am assuming that the board of trustees has taken the proper budgetary problems.

It is therefore, my opinion:

(1) A board of Trustees of a school district may set up a school in a church building for temporary use and to meet an emergency. The selection of a permanent school site and the construction of a school building must be authorized by the qualified electors of the district at an election called for that purpose, within a reasonable time.

(2) School trustees must purchase and furnish free textbooks for the use of the schools in their districts.

(3) School trustees must hire a teacher or teachers for the schools in their districts even though the teachers will be employed temporarily in a new school temporarily located.

Sincerely yours,

R. V. BOTTOMLY

Attorney General

Opinion 80 - 1947

Held: 1. The board of trustees of a county high school has the authority to sell real property owned by the district and undesirable for school purposes under the provisions of Chapter 106, Laws of 1939, as amended by Chapter 232, Laws of 1947.

2. The board of county commissioners has the power to purchase real property necessary for county purposes under the authority granted in Section 4465.7, Revised Codes of Montana, 1935, and in conformity with the provisions of the "Budget Act."

November 18, 1947

Mr. Dick Armstrong
County Clerk and Recorder
Sweet Grass County
Big Timber, Montana

Dear Mr. Armstrong:

You have requested my opinion concerning the sale of county high school property and the purchase of the property by the county. You advise me that the trustees of the county high school purchased a site for a dormitory in 1919, and it has never been used and the trustees would like to sell the property. You also state that the county would like to purchase the same for a county hospital site.

In answering your question it is important to note that a board of trustees has limited powers as was observed in McNair v. School District 87 Mont. 423 288 Pac. 188, in which case the Court said:

> "The board of trustees, therefore, constitutes the board of directors and managing officers of the corporation, and may exercise only those powers expressly conferred upon them by statute and such as are necessarily implied in the exercise of those expressly conferred. The statute granting power must be regarded both as a grant and a limitation upon the powers of the board."

There is no express authority which would permit the

trustees of a county high school to convey property to the county without holding a sale.

As the property under consideration has been held by the school for a great number of years and never been used, and the trustees do not contemplate that it will be used, it can be considered as undesirable for school purposes. Chapter 106, Laws of 1939, as amended by Chapter 232, Laws of 1947, authorizes trustees to sell lands which are unsuitable or undesirable for school purposes and defines the procedure to be followed. The chapter does not require that an election shall be held and thus results in a saving to the county for the sale of property coming within the provisions of the statute.

The board of County Commissioners is limited in its powers as is the board of trustees of the county high school, which principle was recognized in Lewis v. Petroleum County, 92 Mont. 563, 17 Pac. (2d) 60, wherein it was stated:

> "The principle is well established that the board of county commissioners may exercise only such powers as are expressly conferred upon it or which are necessarily implied from those expressed, and that where there is a reasonable doubt as to the existence of a particular power in the board of county commissioners, it must be resolved against the board, and the power denied."

Section 4465.7, Revised Codes of Montana, 1935, grants the power to the board of county commissioners to purchase real property necessary for the use of the county, but a purchase of real property in excess of $1000.00 must not be made without securing an appraisal of the value, and in accordance with the Budget Act.

In your letter you did not state the approximate value of the property, but if the purchase priceis in excess of $10,000.00, one of the provisions of the Section 5 of Article XIII of the

Montana Constitution must be observed, which provides:

> "No county shall incur any indebtedness or liability for any single purpose to an amount exceeding ten thousand dollars ($10,000.00) without the approval of a majority of the electors thereof, voting at an election to be provided by law."

See Opinion No. 43, Report and Official Opinionsof the Attorney General, Volume 22, and Opinion No. 15, Report and Official Opinions of the Attorney General, Volume 21.

It is my opinion that the board of trustees of a county high school has the authority to sell real property owned by the district and undesirable for school purposes under the provisions of Chapter 106, Laws of 1939, as amended by Chapter 232, Laws of 1947.

It is also my opinion that the board of county commissioners has the power to purchase real property necessary for county purposes under the authority granted in Section 4465.7, Revised Codes of Montana, 1935, and in conformity with the provisions of the "Budget Act."

Sincerely yours,
R. V. BOTTOMLY
Attorney General

Opinion 7 - 1951

Held: That a majority of the board of trustees of a school district may be elected at the annual election when oneof the trustees so elected will fill the unexpired term resulting from a vacancy in the office.

March 20, 1951

Mr. Frank T. Hooks
County Attorney
Broadwater County
Townsend, Montana

Dear Mr. Hooks:

You have requested my opinion concerning the filling of a vacancy in the board of trustees of a school in your county. You advise me that the district is a second class district with five trustees and that a vacancy has occurred due to the death of a member whose term would not expire in the year 1951.

Section 75-1614, Revised Codes of Montana, 1947, provides in part:

> "A vacancy in the officeshall be filled by appointment by the county superintendent of schools; provided, that in districts of the first and second class, such appointment shall be subject to confirmation by a majority of the remaining members of said board, if those remaining constitute a majority of the total number of the board. The trustees so appointed shall hold office until the next annual election, at which election there shall be elected a school trustee for the unexpired term."

The above quoted would apparently conflict with Section 75-1617 which reads:

> "When at any annual school election the terms of a majority of the trustees regularly expirein districts of the first class, three trustees, in districts of the second class, two trustees in districts of the third class, one trustee, shall be elected for three years, and the remaining trustee or trustees whose terms expire shall hold over for one or two years as may be necessary to prevent the terms of a majority of the board of trustees expiring in any one year; provided, that it shall be determined by lot, what trustee shall hold over, and for what term."

As there are five trustees in your district, two of whose terms will expire in 1951, the election of a candidate to fill the unexpired term resulting from the vacancy would then result in a majority of the trustees being elected at the next school election. Section 75-1617 contemplates that the terms of trustees be arranged to prevent the terms of a majority expiring in any one year. In the case of Kuhl v. Kaiser, 95 Mont. 550, 27 Pac. (2d) 1113, the court considered the above code sections and held that there is no conflict between the sections and that the word "term" applies to the office and not to the persons and under Section 75-1614 a person appointed to fill a vacancy holds until the next annual election at which time a trustee is elected for the unexpired term. The fact that a majority of trustees will be elected is not violative of Section 75-1617. What is prohibited by the Section is the expiration of the terms of a majority of the trustees at the same time. The election of a trustee for the unexpired term will in no way change the expiration of the terms with the result that at some future date the terms of a majority will expire at the same time.

This will mean in the next election in your county two trustees will be elected each for a three year term and one trustee elected to fill the vacancy and who shall hold office for the unexpired term of the personally originally elected.

It is therefore my opinion that a majority of the board of trustees of a school district may be elected at the annual election when one of the trustees so elected will fill the unexpired term resulting from a vacancy in the office.

Very truly yours,

Arnold H. Olsen

Attorney General

Opinion 36 - 1951

Held: The board of trustees of a school rict may lease a grade school building which is not needed for present school purposes to the United States Government for a period of one year, or for a term that will not interfere with the useof the building in the future for school purposes.

August 27, 1951

Mr. J. J. McIntosh
County Attorney
Rosebud County
Forsyth, Montana

Dear Mr. McIntosh:

You have requested my opinion concerning the power of the Board of Trustees of a school district to lease a school building to the Federal Government for a period of one year. You advise me that one of the grade school buildings in your district is not needed at present for school purposes, but the board of trustees contemplates that the building will be needed for school purposes in the future.

Section 75-1632 Revised Codes of Montana, 1947, as amended by Chapter 207, Laws of 1951, enumerates the powers of every school board and sub-section 7 grants to the trustees the authority:

> "To repair and insure schoolhouses and to rent, lease and let to such persons or entities as the board may deem propor, the grade school halls, gymnasium and buildings and part thereof for such time and rental as the board may designate. All rentals shall be paid to the county treasurer for the credit of the school district."

The above quoted is a broad authorization to the board of trustees to lease school buildings that are not needed for school purposes. In the case of Young vs. Board of Trustees, 90 Mont. 576, 4 Pac. (2d) 725, our Supreme Court approved the

rental of a high school gymnasium for public dances and said:

> "As evidencing the legislative intent and progressive thought on the subject, the foregoing section was amended by the next legislative assembly by eliminating all restrictions and permitting the board to "rent, lease or let" the described property to any "person or entities the board may deem proper, for any purpose and for such time and rental as the board may designate."

Another Montana case which approved the lease of a municipal building is that of Colwell vs. City of Great Falls, 117 Mont 126, 157 Pac. (2d) 1013, where the court said:

> "Indeed a benefit would and does result to them (the taxpayers) by the interim renting of the auditorium of the Civic Center Building at such times as it is not needed for other purposes as provided in the exception clause of the lease under the interim leasing Ordinance No. 835."

There is additional statutory authority given to the Board of trustees of each school district to receive rental for school property as Section 75-1624 R. C. M. 1947, provides in part, "the trustees of the district shall have the power to lease any property belonging to the district which is not being used for school purposes.

School property is acquired by the district for the schools of the district and not as an investment. The lease of any school property should always be made subject to the use of the property for school purposes. It is to be noted that both the Supreme Court and our Legislature in approving the renting of public property restricted the use of the property by others to such times as it was not needed for public purposes. It would therefore, be incumbent upon your trustees to limit the term of the lease of the building so that there will not be any interference with the prospective need for the building for school purposes.

It is, therefore, my opinion that the board of trustees of a school district may lease a grade school building which is not needed for present school purposes to the United States Government for a period of one year, or for a term that will not interfere with the use of the building in the future for school purposes.

Very truly yours,
ARNOLD H. OLSEN
Attorney General

1951

Held: (1) Neither school districts nor Board of Trustees are liable in tort for injuries arising out of the governmental activities of the school in the absence of a specific statute.

(2) School district boards of trustees have no authority to expend school district funds to contract for liability insurance.

October 19, 1951

Mr. Edward J. Ober, Jr.
County Attorney
Hill County
Havre, Montana

Dear Mr. Ober:

You have requested my opinion regarding the liability of a school district and the trustees for injury where a student sustained a broken ankle while engaged in a regularly scheduled tumbling class. This same question has arisen in several districts in connection with the authority of trustees to contract for liability insurance.

In Volume 6, Opinions of the Attorney General, page 427, it was held that the board of trustees has no authority in law for using any part of the school monies to pay doctor's bills for treatment of a student injured by an electric saw in the manual training department, despite the fact that the injury was due to defective machinery. Then Attorney General Poindexter stated:

> "A school district is not liable in tort and its officers have no jurisdiction to compromise or pay any claim such as you describe. It is my opinion the doctrine announced by our supreme court in Smith v. Zimmer, 45 Mont. 282, 48 Mont. 332, with respect to non-liability of counties for tort and individual liabilites of county officers for neglect, applies with equal force to school districts and

the officers thereof."

In the many years since that opinion has been issued, it has not been reversed or questioned.

Our Supreme Court has directly passed upon school district liability on several occasions.

The general rule holds the school district immune from suit for injuries caused by negligence of its officers, agents or employees, unless liability is imposed by specific statute. Perkins v. Trask, et al., 95 Mont. 1. This rule was affirmed generally by the later case of Bartell v. School District 28, 114 Mont. 451, 137 Pac. (2d) 422.

The Bartell case involved an accident which occurred on a playground field, and the language of the court thereon is applicable to the instant situation. At page 457 of 114 Mont. the Court stated:

> "It is unquestioned that physical training is part of the educational duty entrusted to the public schools (McNair v. School District No. 1, 87 Mont. 423, 288 Pac. 188, 69 A. L. R. 866). We find no authority for the proposition that these educational duties are limited to members of voluntary athletic teams and can imagine no serious argument which could be made to that effect."

In the latest case concerning the liability of a school district, Rhoades v. School District No. 9, the argument of distinction between governmental and proprietary functions was strongly urged. The Rhoades case concerned an injury to a paying spectator at a basketball game conducted by the high school and resulting from a collapse of a stairway in the gym. The court found the allegations of negligence sufficient to state a cause of action "if the school district or its board of trustees is liable in negligence," and held that the school was acting in a governmental capacity in conducting the basket-

ball game, and was therefore not liable.

The general rule has been little modified by the language of the later cases. So far as it applies to the instant situation, it is unchanged.

It is therefore my opinion that neither the school district nor the trustees are liable in tort for any injury arising out of the governmental activities of the school.

The stated distinction between governmental and proprietary functions which has developed in the later opinions of the Supreme Court has given rise to a correlative question concerning the authority of school districts to contract for liability insurance. In view of the long established rule of non-liability set forth supra, there appears little practical basis for such an expenditure of school district funds. Decisions based upon cases arising against municipalities are not good yardsticks by which to measure the liability of a school district. While both are corporate entities, the scope of activity allowed a municipal corporation leads to many activities proprietary in nature. The school districts operate within the more restricted area of statutory authority. It is not empowered to engage in non-educational activities and is therefore not subject to the same possibilities for liability as is a municipal corporation today. This distinction is set forth by our Supreme Court in the recent case of Felton v. Great Falls, 118 Mont, 536, 169 Pac. (2d) 229.

It is therefore my opinion that a board of trustees has no authority to expend school district funds upon liability insurance in the absence of specific statutory authority.

Very truly yours,
ARNOLD H. OLSEN
Attorney General

Opinion 54 - 1951

Held: 1. The board of trustees of a school district maintaining a high school and the board of trustees of a county high school have the power to enter into contracts with the State Water Conservation Board a water users' association for the furnishing of water and sewerage disposal for the schools of the district and the county high school.

2. A high school district, acting through its board of trustees, does not have the power or authority to enter into a water and sewerage disposal contract.

December 29, 1951

Mr. M. L. Parcells
County Attorney
Stillwater County
Columbus, Montana

Dear Mr. Parcells:

You have requested my opinion concerning the authority of a high school district and a school district to enter into water and sewerage service contracts with the State Water Conservation Board and a water users' association.

The contracts provide for annual payments over a period of years for the services furnished. The school districts would be participating purchasers in the water users' association.

The case of Farmers State Bank v. City of Conrad, 100 Mont. 415, 47 P.(2nd) 853, approved the execution of such

contracts by a city, and the reasoning in the case would apply to school districts. An opinion of this Office, Opinion No. 238, Vol. 18, Report and Official Opinions of the Attorney General, approved such contracts for school districts and I agree with this opinion.

A high school district is to be distinguished from a school district as a high school district has limited powers. Section 75-4605, R. C. M., 1947, as amended, states:

> "The high school districts created under the provisions of this act, are for construction, repair, improvement and equipment purposes only and it shall not be construed so as to interfere with or repeal any existing laws relating to the maintenance or operation of high schools within the county."

This is a specific limitation on the powers of the high school district and it is an express recognition that the law for the government of a high school as found elsewhere is not altered or repealed. Section 75-4101 R. C. M., 1947, defines a high school as follows:

> "A high school is a public school as defined in the general school laws and is an integral unit of the public school system which comprises some one or more of the grades of school work intermediate between the elementary schools and the institutions of higher education of the state of Montana, and which has its own administrative head and corps of teachers under the direct supervision either of a district superintendent and the board of trustees of a school district, or of a county high school principal and board of trustees of such county high school, as the case may be."

This statute places the control and supervision of the

high school in the board of trustees of the school district maintaining the high school or in the board of trustees of the county high school. This is not altered by the law authorizing the establishment of high school building districts as Section 75-4601, R. C. M., 1947, as amended, provides in part:

> "In any county having a high school, the board of trustees of the county high school, if there be one, and the boards of trustees of any school districts maintaining high schools, are hereby designated as the boards of trustees of the respective high school districts established under this act."

The recent case of Rankin v. Love, Mont., 232 Pac. (2nd) 998, raises a doubt as to the validity of high school building districts, yet such is not materisl here as in any event a high school district does not have the authority, acting through its board of trustees, to enter into a contract pertaining to the operation of a high school.

This does not mean the trustees of a district maintaining a high school, or the board of trustees of a county high school, cannot enter into such a contract. In fact they have such power.

It is therefore my opinion:

1. The board of trustees of a school district maintaining a high school and the board of trustees of a county high school have the power to enter into contracts with the State Water Conservation Board and a water users' association for the furnishing of water and sewerage disposal for the schools of the district and the county high

school.

2. A high school district, acting through its board of trustees, does not have the power or authority to enter into a water and sewerage disposal contract.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 102 - 1952

Held: The Board of Trustees of a School district may not engage in any activities which are not exclusively for educational purposes.

Whether or not the school district may operate a cannery as part of their adult education program is a question which must be decided by the members of the board of trustees. The determinate factor being the utility of the appliance for educational uses. However, the cannery may in no manner be used as a commercial or general service device.

July 9, 1952

Mr. Robert Hurley
County Attorney
Valley County
Glasgow, Montana

Dear Mr. Hurley:

You have submitted the following question to me for an official opinion:

> "May the board of trustees of a school district operate a cannery as part of their adult education program?"

It is a basic proposition that school boards have no powers except those expressly granted, or necessarily implied from those granted. See, McNair vs. School District No. 1 of Cascade County, 87 Mont. 423, 228 Pac. 188.

Section 75-1633, Revised Codes of Montana, 1946, provides:

> "The board of trustees of any school district or of any county high school is authorized to permit the use of school rooms for adult education, schools or classes for adults sixteen (16) years of age or over, and if the school is desirous of raising money

> To help effect the purpose of this act, the board of county commissioners may levy a tax of not to exceed one (1) mill on the dollar of all taxable property real and personal within the district, in addition to all other levies for school purposes, for the support and maintenance of such adult education, schools or classes, provided that the board of school trustees of any such district requiring such levy must call an election in the manner prescribed for such extra levies by section 75-1707, for the purpose of obtaining the approval of the district to the making of such additional levy and provided further that such election must be held before the first day of July."

It has been held that "education" is the process of developing and training the powers and capabilities of human beings, as preparing and fitting one for a calling or business, or for activity or usefulness in life, and may be particularly directed to either mental, moral or physical powers and facilities, but in its broadest and best sense it relates to all of them. Lyme High School Ass'n vs. Alling 113 Conn. 220, 154 A. 438, also, McNair vs. School District No. 1 of Cascade County, (supra)

A cannery, that is, canning machinery and the operation thereof is as much a part of adult education as welding machines and manual training equipment, as such it may be maintained and operated in the school. However, a commercial cannery not intended for instructional purposes would not be within the purview of a school district. School funds cannot be used for a community project which is unrelated to education. Section 75-4131, R. C. M., 1947, enumerates the general powers and duties of boards of

trustees. It is a basic proposition that school boards have no powers except those expressly granted, or necessarily implied from those granted. McNair vs. School District No. 1 of Cascade County, 87 Mont. 423, 228 Pac. 183. Consequently, the school board must act within the purview of this statute. The statute clearly limits the school trustees to educational functions.

What constitutes educational purposes has been raised in cases involving private liability. See Perkins vs. Trask et al., 95 Mont. 1. 23 Pac. (2d.) 983. Bartell vs. School District No. 28, Lake County, 114 Mont. 451, 137 Pac. 422. The question might well arise again in this instance. Given a community project operated by a school district and utilized generally, who would be liable for accidents? If used exclusively for education general immunity would extend to the school district. However, if the cannery is used commercially, the trustees might be individually liable.

Whether the board should enter into such an arrangement is in the final analysis, a question of administrative discretion with which the board is vested and determinative only by the board itself. It becomes a question of fact rather than law. In order to bring the facts within the law the cannery must be operated exclusively to educate adults in the methods of canning. Whether it is necessary to have a canner in order to teach proper canning methods such as would be adaptable to better home techniques is for the board to decide. If the cannery is to be operated

as a commercial project whereby people can bring their goods to be canned as they desire it is not a proper function of the school district in the absence of legislative permission, no matter how worthwhile the project may be from a civic viewpoint.

It is therefore my opinion that the board of trustees may not engage in any endeavors which are not exclusively for educational pruposes. Whether or not the school district may operate a cannery as a part of their adult education program is a question which must be decided by the members of the board, the determinate factor being the utility of the appliance for educational uses.

It is further my opinion that the cannery may in no manner be used as a commercial or general service device. Such functions are beyond the powers of the board of trustees.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 4 - 1953

Held: The additional members elected to the board of trustees of districts maintaining high schools which high schools are also district high schools, shall participate on an equal basis with other members in all business transacted pertaining to the high school.

January 30, 1953

Mr. Leo H. Murphy
County Attorney
Teton County
Chouteau, Montana

Dear Mr. Murphy:

You have requested my opinion concerning the powers of the additional trustees elected to the board of trustees of districts maintaining high schools.

Chapter 188, Laws of 1951, amended Section 75-4601, R. C. M., 1947, to allow the election of additional trustees to boards of trustees of school districts maintaining high schools which are also district high schools. The amendment provided in part:

> "The additional members elected to the board of trustees of districts maintaining high schools, shall take office immediately after qualifying and shall participate on an equal basis with other members in all business transacted by the board of trustees pertaining to the high school maintained by said districts."

The above quoted portion of the state is unambiguous and standing alone would not require interpretation. However, there is another statutory provision in the high

school district law that is in apparent conflict. I refer to Section 75-4605, R. C. M., 1947, as amended by Chapter 188, Laws of 1951, which reads in part as follows:

> "The high school districts created under the provisions of this act, are for construction, repair, improvement, and equipment purposes only, and it shall not be construed so as to interfere with or repeal any existing laws relating to the maintenance or operation of high schools within the county."

The amendment to Section 75-4605 did not affect or alter this part of the statute which has been the law since its enactment as Chapter 275, Laws of 1947. In State ex rel. Henderson vs. Dawson County, 87 Mont. 122, 286 Pac. 125, Our Supreme Court said:

> "***where a section or a part of a section is amended, it is not to be considered as having been repealed and re-enacted in its amended form, but the portions which are not altered are to be considered as having been the law from the time when they were enacted."

The limited purposes of high school districts were designated in Section 75-4605 prior to the amendment of Section 75-4601, which latter section was amended so as to provide additional trustees and thus make high school districts administrative units for high schools. If we were to ignore the express declaration that the "additional members shall participate in all business pertaining the high school" then the amendment would be a nullity. In Nichols vs. School District, 87 Mont. 181, 287 Pac. 624, the court said:

> "In the construction of an amendatory act it will be presumed that the legislature, in adopting it, intended to make some change in the existing law, and the courts will endeavor to give some effect to the amendment."

It is therefore my opinion that the additional members elected to the board of trustees of districts maintaining high schools, which high schools are also district high schools, shall participate on an equal basis with other members in all business transacted pertaining to the high school.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 67 - 1954

Held: It is not the duty of the board of trustees of school districts to conduct the election of trustees of hospital districts.

March 29, 1954

Miss Mary M. Condon
Superintendent of Public Instruction
State Capitol Building
Helena, Montana

Dear Miss Condon:

You have requested my opinion as to whether school trustees are to conduct the elections for hospital district trustees.

Section 7, Chapter 155, Laws of 1953, provides for the government of hospital districts and fixes the terms of procedure for election of trustees. This section states in part:

> "...All elections thereafter shall be conducted by said qualified voters in the same manner as election for school trustees of a first-class school district..."

The election of school trustees is held on the first Saturday in April of each year, as Section 75-1603, R. C. M., 1947, fixes such day as school election day. Section 7 of Chapter 155, supra, does not designate any particular day of the year for holding the election of hospital district trustees. However, a method is fixed for ascertaining the election day for hospital district trustees. Section 7

of Chapter 155, supra, states that the trustees first elected hold for terms which commence on the date of the organization of the district and these terms are for one, two or three years. The election for the creation of the hospital district may be held, according to Section 5 of the act, at the next general election or at a special election. Such an election would not be held, in all probability, on the first Saturday in April, and as a consequence would not conform with the school election date, and a change from the anniversary date of the first election of trustees to the first Saturday in April would alter the terms of the trustees first elected.

The fact that Section 7 of Chapter 155, supra, requires "all elections thereafter shall be conducted by said qualified voters in the same manner as election for school trustees of a first class school district, " does not make it the duty of school officers to conduct the election. The effect of this provision is to incorporate by reference the procedural statute for conducting the election, but no duties are imposed on the school trustees. The title to Chapter 155, supra, does not state that this is one of the purposes of this new legislation.

As a practical matter, it would not be possible in all counties for the trustees of a school district to conduct the election as there is a marked difference in nominating

candidates in first-class districts and third-class districts. (Sections 75-1604 and 75-1606 R. C. M., 1947). In fact, there is no election held in first-class districts when only one candidate is nominated for each term to be filled. Also, many counties do not have first-class school districts.

Another probable obstacle to an election conducted by school trustees is that the boundaries of any one school district will not conform to the boundaries of the hospital district with resulting conflicting authority of two or more school boards.

It is, therefore, my opinion that it is not the duty of the board of trustees of school districts to conduct the election of trustees of hospital districts.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 93 - 1954

Held: The board of county commissioners and the board of trustees of a county high school may lease to a school district for a term not exceeding four years a county high school building not needed for the purposes of the county high school, which building would be used by the district for school purposes.

August 27, 1954

Mr. Harold L. Allen
County Attorney
Gallatin County
Bozeman, Montana

Dear Mr. Allen:

You have requested my opinion concerning the power of the board of trustees of a county high school to lease a high school building to a school district to be used for junior high school purposes. You advise me that a new high school will be constructed and the present county high school building will not be needed for high school purposes after the construction of the new building.

As a county high school is constructed with county funds and by the issuance of county bonds, the legal title to the county high school is in the county. (Pierson v. Hendricksen, 98 Mont. 244, 38 Pac (2d) 991.) Section 75-1636, R. C. M. 1947, gives specific authority to the county commissioners to lease any county real or personal property to school districts. This section reads as follows:

"Leasing of County Lands for School Purposes -

> Limitation of Term. Whenever any county of the state of Montana shall have acquired title to any real or personal property in any manner now provided by law and such property is suitable or useful for dormitory or gymnasium or school purposes to any public school located within the same city, town or school district where said property is situated, the board of county commissioners of said county may, upon request of the board of trustees of any such school district, lease said property to such school district for school dormitory or gymnasium purposes for such rental as the said board of county commissioners may deem adequate and for such term of years, not exceeding four years, as the board may see fit."

It is to be noted in the above quoted statute that the commissioners have not only discretionary power as to whether a lease should be given to a school district, but, also, as to the rental. However, the term of the lease cannot exceed four years.

Subsection 11 of Section 75-4231, R. C. M. 1947, grants to the trustees of every county high school the power:

> "To rent, lease and let to such persons and entities as the board may deem proper the high school halls, gymnasiums, buildings, and parts thereof, for such time and rental as the board may designate, and to pay over to the county treasurer all sums collected on account of such letting for the credit of the high school."

The above quoted gives broad authority to the trustees of a county high school to lease school buildings. Exact limitations are not prescribed on the exercise of the power and as a consequence much is left to the discretion of the trustees. In view of this section and Section

75-1636, R. C. M. 1947, both the county commissioners and the trustees of the high school district should execute the lease and avoid any question concerning the proper parties to sign the lease on behalf of the county.

In considering your problem, the authority of the school district to become the lessee must be sanctioned by statute. Subsection 8 of Section 75-1632, R. C. M. 1947, gives authority to every school board "to build, purchase or otherwise acquire schoolhouses, school dormitories and other buildings necessary in the operation of schools of the school district, and to sell and dispose of the same." This also is a broad power and permits the trustees of a school district to lease buildings necessary for the operation of the schools of the district. The case of Bennett v. Petroleum County, 87 Mont. 436, 288 Pac. 1018, approved a lease entered into by the board of county commissioners of buildings for the use of the county. The statute under which such lease was made was very broad in its terms and while it specifically authorized the leasing of buildings for county purposes yet the case is authority for a school district to lease buildings as Subsection 8 of Section 75-1632, R. C. M., 1947, is also a broad grant of power.

The beneficial title to all school property is in the state (Pierson v. Hendricksen, 98 Mont. 244, 38 Pac (2d) 991)

and it would serve the public interest by permitting a school district to use county high school buildings not necessary for the county high school.

It is, therefore, my opinion that the board of county commissioners and the board of trustees of a county high school may lease to a school district for a term not exceeding four years a county high school building not needed for the purposes of the county high school, which building would be used by the district for school purposes.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 24 - 1955

Held: The trustees of a school district do not have the power of authority to establish and budget for a six- year high school.

July 2, 1955

Mr. Chester L. Jones
County Attorney
Madison County
Virginia City, Montana

Dear Mr. Jones:

You have requested my opinion as to whether a school district has the authority to establish and budget for a six-year high school.

In answering your question it is necessary to consider the limited power of the trustees of the school district. In McNair v. School District No. 1, 87 Mont. 423, 288 Pac. 188, our Supreme Court said:

> "...The board of trustees, therefore, constitutes the board of directors and managing officers of the corporation, and may exercise only those powers expressly conferred upon them by statute and such as are necessarily implied in the exercise of those expressly conferred. The statute granting power must be regarded both as a grant and a limitation upon the powers of the board..."

From the above quoted it is apparent that the officers of the school district are limited to express statutory provisions in the administration of the schools of the districts.

Section 75-4101, R. C. M., 1947, defines a high school as an integral unit of the public school system which comprises one or more of the grades of school work between the

between the elementary school and the institution of higher education. A junior high school is defined in Section 75-4102, R. C. M., 1947, as a public school which comprises work of the seventh, eighth and ninth grades of the school system. In your question you ask if a school can be established which will include all of the grades of a high school and in addition the seventh and eighth grades which are elementary grades. As the trustees have limited powers and the statutes authorize high schools, junior high schools and elementary schools, the proposed school does not fit in any one of the three. The High School Budget Act has application to all districts maintaining high schools and all county high schools. When a junior high school is established, the high school budget supports the educational costs of all high school pupils in the junior high school. There is no statutory provision for the adoption by the trustees of an independent budget for the junior high school. Also, the legislature has not authorized a school comprising the last six grades of work and in the absence of a statute authorizing such a new school, the doubt must be resolved against the power to establish such a school with an independent budget.

It is therefore my opinion that the trustees of a school district do not have the power of authority to establish and budget for a six-year high school.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 34 - 1955

Held: 1. The trustees of a school district are not authorised to accept a combination bid for contracts of transportation for two school bus routes when the advertisement for bids stated and requested bids for each route separately, and when the lowest bidder for each route was rejected and a combination bid accepted with greater expense to the school district.

2. The board of trustees of a school district has discretionary power in determining the responsibility of bidders, but such discretionary power must be based on facts and is not an arbitrary power.

August 18, 1955

Mr. B. Miles Larson
County Attorney
McCone County
Circle, Montana

Dear Mr. Larson:

You have requested my opinion as to whether the trustees of a school district may accept a combination bid for two transportation routes when the two routes were advertised as separate items. You state that separate bids were offered for the two routes which were lower than a combination bid for the two routes and the trustees accepted the combination bid.

Contracts for transportation of school children are covered in Section 75-3405, R. C. M., 1947. The portion of this section with which we are concerned reads as follows:

"...The board shall let the contract to the lowest responsible bidder; provided, that the

board shall have the right to reject any and all bids."

The problem you present is whether a combination bid of two routes may be considered the lowest bid when bids were submitted for the two routes at an aggregate figure lower than that contained in the combination bid. While the trustees had the authority to request bids for the two routes as a unit, y et not having done so, bids must be considered only on the contracts as advertised. In 78 C. J. S. 1266, the text states:

"...A board of education may not let contracts for two different buildings to a bidder whose aggregate bid is the lowest, if contracts with responsible bidders might be made for a smaller sum by contracting separately for each building."

The above quoted is in accord with our statutory requirement that the contract shall be let to the lowest bidder. To accept a combination bid which will result in a greater cost to the school district and also vary from the request for bids contained in the advertisement would not be in the best interests of the school district and would mislead bidders.

It is true that the trustees of a district have some discretionary power in determining the responsibility of bidders. In Hudson vs. the Board of Education, 41 Ohio, app. 402, 179 N. E. 701, in determining the responsibility of a prospective contractor, the court recognized the

limitation placed on a board of trustees in determining the responsibility of a prospective contractor. The Ohio Court quoted with approval the following:

> "The term 'responsible' is not, however, limited to pecuniary ability... but pertains to many other characteristics of the bidder, such as his general ability and capacity to carry on the work, his equipment and facilities, his promptness, and the quality of work previously done by him, his suitability to the particular task, and such other qualities as are found necessary to consider in order to determine whether or not, if awarded the contract, he could perform it strictly in accordance with its terms." (Emphasis Supplied)

It is therefore my opinion that the trustees of a school district are not authorized to accept a combination bid for contracts of transportation for two school bus routes when the advertisement for bids stated and requested bids for each route separately, and when the lowest bid from a responsible bidder for each route was rejected and a combination bid accepted with greater expense to the school district.

It is also my opinion that the board of trustees of a school district has discretionary power in determining the responsibility of bidders, but such discretionary power must be based on facts and is not an arbitrary power.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 35 - 1955

Held: 1. That the Board of Trustees of School District No. 1 of Silver Bow County in appointing a teacher who is not a teaching principal to the position of supervisory principal, violated Section 3 of Rule 4 when there were teaching principals qualified and willing to accept the position.

2. That it is the duty of the Board of Trustees when there is a vacancy in the position of supervisory principals, to give sufficient and adequate notice to all teaching principals of such vacancy, which notice should request applications to be filed with the board on or before a fixed date.

3. That the Board of Trustees has the power and authority to transfer supervisory principals from one school to another, and after such transfer any vacancy in the position of supervisory principal must be filled from the ranks of the teaching principals.

August 22, 1955

Mr. N. A. Rotering
County Attorney
Silver Bow County
Butte, Montana

Dear Mr. Rotering:

You have requested my opinion concerning the employment of a supervisory principal for a school in your county. You have submitted for my consideration a copy of the rules

relating to the employment of teachers in School District No. 1 of your county which are a result of an agreement between the Board of Trustees and the Butte Teacher's Union. You state that the trustees appointed a teacher to the position of supervisory principal and this resulted in a controversy as to whether there had been a violation of one of the rules of employment in the school system.

Section 3 of Rule 4, which is pertinent to the controversy here, reads as follows:

> "Section 3. Beginning principals will be considered for assignment to teaching principalships, and the teaching principals with the greatest seniority will be considered for advancement to supervisory principalships. All teaching principals must indicate their desire and file requests with the Board to become supervisory principals; however, if any teaching principal with seniority does not wish to accept a supervisory principalship, the principal next in line of seniority will be considered for the position."

The first sentence of the above quoted rule in stating "Beginning principals will be considered for assignment to teaching principalships,..." clearly indicates that teachers who are appointed principals must first start as teaching principals. An apprenticeship as a teaching principal is contemplated before an advancement is made to a supervisory principalship. This conclusion becomes apparent when the second part of the first sentence of Rule 4 is considered, which reads: "...and the teaching principals with the greatest seniority will

be considered for advancement to supervisory principalship."

The word "consider" as used in the rule might be interpreted to mean that teaching principals, together with all other persons having the necessary qualifications other than the position of teaching principal will constitute a group from which the Board has the power to pick a supervisory principal. Such an interpretation would render Section 3 of Rule 4 meaningless and of no effect. However, if the word "consider" as used in the rule is limited in meaning and the Board must pick from the teaching principals the supervisory principals, then the rule will accomplish its purpose.

The selection of a supervisory principal from a group of teaching principals is analagous to a civil service system wherein the appointing power may select an employee from a number of names which are certified as eligible by the civil service commission to an appointing officer in reference to the making of a particular appointment.

In State vs. Frear, 146 Wis. 302, 131 N.W. 832, it was held that a Civil Service Law which provided that upon notice by an appointing officer of a vacancy, the Civil Service Commission shall certify three names of eligible persons for appointment is a valid law. The court said concerning the discretionary appointing power that:

"The opinion doubtless also prevailed in the

> Legislature that a selection from three candidates on the certified eligible list would provide a sufficient scope for the exercise of a reasonable discretion by the appointing officer in making appointments of persons found to be qualified to perform services under the appointing officer."

The Board of Trustees has the appointing power. Section 3 of Rule 4, means that supervisory principals must be selected from teaching principals. Thus, Section 3 of Rule 4 regulates the selection of supervisory principals, but does not deprive the trustees of the appointing power.

The second portion of Section 3, Rule 4, provides: "All teaching principals must indicate their desire and file request with the Board to become supervisory principals,." While this provision does not specifically state that notice must be given to each teaching principal that there is a vacancy to be filled for a supervisory principalship, yet, if such notice is not given, then an injustice might result. In the absence of a specified form of giving notice, a reasonable method which gives adequate time for preparation would satisfy this requirement. It is my opinion that a written notice, or letter, directed to each of the teaching principals stating that a vacancy is to be filled in the position of supervisory principal should be mailed to each teaching principal and such notice should state the time in which applications should be filed with the board. As the board has the power to transfer a supervisory principal from one school to another, it would be

the better policy first to make any transfer considered desirable and then state in the notice the school for which a supervisory principal is to be appointed.

Under Section 75-2517, R. C. M., 1947, it is provided in Subsection 4, that a person, in order to be a principal or supervisor, must not only be qualified to teach in such school, but in addition shall have such qualifications as the State Board of Education may from time to time prescribe. The applicant must have a certificate from the State Board of Education stating that he or she is qualified before a contract may be entered into with the Board of Trustees of the school district.

It is therefore my opinion:

1. That the Board of Trustees of School District No. 1 of Silver Bow County in appointing a teacher who is not a teaching principal to the position of supervisory principal, violated Section 3 of Rule 4 when there were teaching principals qualified and willing to accept the position.

2. That it is the duty of the Board of Trustees, when there is a vacancy in the position of supervisory principal, to give sufficient notice to all teaching principals of such vacancy, which notice should request applications to be filed with the Board on or before a fixed date.

3. That the Board of Trustees has the power and authority to transfer supervisory principals from one school

to another, and after such transfer any vacancy in the position of supervisory principal must be filled from the ranks of the teaching principals.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

CHAPTER REFERENCES

The following official opinions of the attorney general can be found in Volume 21 of the Report and Official Opinions of the Attorney General.

Opinion 118 - 1946
Opinion 132 - 1946
Opinion 136 - 1946
Opinion 179 - 1946

The following official opinions of the attorney general can be found in Volume 22 of the Report and Official Opinions of the Attorney General.

Opinion 15 - 1947
Opinion 23 - 1947
Opinion 55 - 1947
Opinion 80 - 1947

The following official opinions of the attorney general can be found in Volume 24 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 7 - 1951
Opinion 36 - 1951
Opinion 43 - 1951
Opinion 54 - 1951
Opinion 102 - 1952

The following official opinions of the attorney general can be found in Volume 25 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 4 - 1953
Opinion 67 - 1954
Opinion 93 - 1954

The following official opinions of the attorney general can be found in Volume 26 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 24 - 1955
Opinion 34 - 1955
Opinion 35 - 1955

CHAPTER IV

ATTENDANCE

Opinion 11 - 1947

Held: A school district may recover under the law the amount of the cost of educating a child in the elementary school from the school district of the child's residence when the requisite permission for attendance had been given.

A school district is not required to permit the attendance of a child resident in another district at its elementary school when the child has not received the requisite permission for transfer from the county superintendent of the county of the child's residence.

February 14, 1947

Mr. Herb W. Conrad, Jr.
County Attorney
Pondera County
Conrad, Montana

Dear Mr. Conrad:

You have requested my opinion concerning the following:

Prior to the school year of 1945-1946 and within the time required by law the Board of Trustees of School District No. 19 in Pondera County gave its written permission for five elementary school children residing in School District No. 26 of Teton County to attend school in School District No. 19 of Pondera County, Montana. The superintendent of schools of Teton County gave her consent to the attendance of said children at School District No. 19. The budget for School District No.

26 of Teton County included an item for the transfer of funds to pay the educational costs of the school in Pondera County for five children, but the county superintendent in Teton County did not notify the treasurer and request a transfer of the funds. You ask if the Pondera County School District may recover the amount due for the attendance of these children at the Pondera County School.

You also advise there are children from Teton County who are attending school in Pondera County, but the superintendent of schools of Teton County refused to grant permission for such attendance and the school district in Teton County refuses to pay the costs for such attendance.

Your questions come within the provisions of Chapter 203, Laws of 1943, which provides in part:

> "Children may attend public elementary schools... when in a district in an adjoining county written permission is secured from the Board of Trustees of the district in which they are to attend school and when written permission has been given by the county superintendent of schools of the County in which the children reside."

The proper written permissions were given for the attendance of the five children in the school year 1945-1946 and the liability of the district of the residence is apparent from the following quoted portion of Chapter 203:

> "When approval of attendance in another district within or without the county has been granted, the district in which such child resides shall pay to the school district where such child attends, the actual cost of educating a child in the school attended

While Chapter 203 makes it the duty of the county superintendent of the county of the child's residence to notify the treasurer the child is attending school in another district, yet the failure to notify will not relieve the school district of the child's residence of the liability. The liability becomes fixed upon the requisite permission being granted by the county superintendent of the county of the child's residence and also of the board of trustees of the district educating the child. It is to be noted the board of trustees of the school district in which the child resides is not required nor has it the authority to grant or deny permission for the attendance of a child in another district.

Section 1022, R. C. M., 1935, provides a school district "may sue and be sued."

It is, therefore my opinion a school district may recover under the law the amount of the cost of educating a child in the elementary school from the school district of the child's residence when the requisite permission for attendance had been given.

Under the facts given in your second question, the county superintendent of the county of the child's residence did not give permission for attendance in the elementary school located in your county. Such permission is a condition precedent to the liability and also to attendance under

Chapter 203.

Under certain conditions enumerated in Chapter 203, "permission must be granted for such attendance in another district." It is the duty of both the county superintendent of the county of the child's residence and the board of trustees of the school to be attended to grant permission for attendance in another district when such conditions are met and an appeal may be taken to the state superintendent of public instruction to remedy any unwarranted refusal to grant permission.

It is, therefore, my opinion a school district is not required to permit the attendance of a child resident in another district at its elementary school when the child has not received the requisite permission for transfer from the county superintendent of the county of the child's residence.

Sincerely yours,

R. V. BUTTOMLY
Attorney General

Opinion 73 - 1947

Held: A family which moves from one county to another county which change of habitation is the same ranch, results in the family becoming residents of the latter county and the children should be included in the latter county.

October 31, 1947

Mr. Chester E. Onstad
County Attorney
Powder River County
Broadus, Montana

Dear Mr. Onstad:

You have requested my opinion concerning the residence of a family which lives on a ranch located in both Powder River County and Rosebud County. You state that the family resided on that portion of the ranch which is in Powder River County for a period of ten years, but in December, 1945, they constructed a $10,000.00 house on the ranch property in Rosebud County, and have, since December 1945, lived in the house the major part of each year. You also state that the family never intended to change residence to Rosebud County and the parents consider their residence to be in Powder River County.

You have also asked in which county the children should be considered residents for school census purposes.

Section 33, R. C. M., 1935, states rules for determining residence. Rule one defines residence as follows:

> "It is the place where one remains when not called elsewhere for labor or other special or temporary purpose and to which he returns in seasons of repose."

If the above quoted rule were alone the test, then under the facts given habitation in the new home would make Rosebud County the residence. However, sub-section 7 of Section 33 states, "The residence can be changed only by the union act and intent." From the facts you give, it affirmatively appears that there is no intent to change the residence from Powder River County to Rosebud County. While this intent must be given great weight, yet in 17 Am. Jur. 605, the text states, "A mans home is where he makes it not where he would like to have it."

The determination of the residence of a family is not a question of law alone, but is in great measure a question of fact. Our Supreme Court in Sommers v. Gould, 53 Mont. 538, 165 Pac. 599, recognized that rules for determining residence must be of necessity mere guides and rules of assistance. There might well be other facts which will alter the conclusion reached.

In the case State ex rel. Duckworth v. District Court, 107 Mont. 97, 80 Pac. (2d) 367, the Court recognizes the importance of habitation in fixing the domicile and said:

> "That place is the domicile of a person in which he has voluntarily fixed his habitation, not for a mere temporary or special purpose, but with a present intention of making it his home unless and until something, which is uncertain and unexpected, shall happen to induce him to adopt some other permanent home."

Also, Subsection 9 of Section 574, R. C. M., 1935, in

relation to residence for the purpose of voting, states:

> "A change of residence can only be made by the act of removal joined with the intent to remain in another place. There can only be one residence. A residence cannot be lost until another is gained."

The application of the above to the facts submitted results in the conclusion that Rosebud County is now the residence of the family. The construction of the new house and the habitation within the house constitutes the act of removal joined with the intent to remain sufficient to be a change in residence.

The holding in Opinion 510, Volume 15, Report and Official Opinions of the Attorney General, is contrary to the views herein stated in that the intent for the purpose of residence in that opinion appears to be divorced from the acts of the parties. The acquisition of a permanent place of abode establishes an intent superior to the intent expressed, which amounts to a mere desire to retain a former residence from which the person has removed permanently. To the above extent, the former opinion is hereby expressly overruled.

The residence of minor children is that of the parents and this is true under both Section 33, R. C. M., 1935, and Section 1051, R. C. M., 1935, which latter section defines the manner of making the school census.

It is, therefore, my opinion under the facts given, that a family which moves from Powder River County to

Rosebud County, which change of habitation is on the same ranch, results in the family becoming residents of Rosebud County and the children should be included in the census of the school district in Rosebud County.

Sincerely yours

R. V. BOTTOMLY
Attorney General

Opinion 135 - 1950

Held: 1. When a School Board closes a school in a school district the Board is not required to furnish actual transportation by bus or rail, but rather may pay to the parent or guardian the cost of transportation in accordance with the schedule of payments provided by law.

2. Sections 75-2901 and 75-2906, R. C. M., 1947, provide a procedure for compelling a parent to send children within the school age to school.

November 24th, 1950

Mr. Roy W. Holmes
County Attorney
Carter County
Ekalaka, Montana

Dear Mr. Holmes:

You have requested my opinion on the following questions on behalf of the County Superintendent of Schools of your County.

1. May the Board of Trustees of a school district close a school in a district and merely pay the parents of pupils for transporting the pupils to another school, or must the trustees furnish actual transportation by bus or other vehicle?

2. How may a parent who refuses to send his children to school be forced to do so?

Section 75-3404, R. C. M., 1947, was originally enacted as Section 4, Chapter 152, Session Laws of 1941, and provides in part as follows:

> "The Board of Trustees shall have the power to close any elementary school within the district, and transport the pupils to another school or schools within that district, when the Board deems such act to be for the best interests of all the pupils attending school..."

It is clear that the Board of Trustees may close a school in a district and the question then arises as to what is meant by the word "transport" in the above section.

Section 75-3402, R. C. M., 1947, which was enacted as Section 2, Chapter 152, Session Laws of 1941, defines what is meant by the term "transportation" as that term is used in Chapter 152 of the Laws of 1941. This section provides:

> "Unless a different meaning is plainly required by the context, 'transportation' shall, in this act, mean (1) the actual transporting of pupils who live three (3) or more miles distant from a public school, by bus, rail or otherwise; (2) the providing of any services whereby the school board is relieved of actually transporting such pupils, such as paying parent or guardian for transportation, paying rent or board or any part thereof and providing supervised correspondence study or supervised home study."

The context of Section 75-3404, supra, clearly indicates that the word "transport" as used therein is defined by Section 75-3402, supra. Therefore, it is my opinion that if the Board of Trustees of a school district closes a school it may pay the parent or guardian in accordance with the schedule set forth in Section 75-3407, R. C. M., 1947, as amended by Chapter 200, Session Laws of 1949, and need not provide actual transportation by bus, rail, or otherwise. The purpose of giving the term"transportation"a dual meaning

in Chapter 152, Session Laws of 1941, was to allow a School Board to exercise its discretion and provide for payment to parents for transportation when circumstances were not such as to warrant the supplying of actual transportation facilities by the school district.

Section 75-2901 to 75-2906, inclusive, make it compulsory that children between the ages of eight and sixteen years of age be sent to a school in which the basic language taught is English. Section 75-2901, as amended by Chapter 61, Session Laws of 1949, provides in part as follows:

> "...Any parent, guardian or other person having the care and custody of a child between the ages of eight (8) and sixteen (16) years, who shall fail to comply with the provisions of the section, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five dollars ($5.00) nor more than twenty dollars ($20.00)."

Thus a parent who refuses to send his child to school may be found guilty of committing a misdemeanor, and subject to fine.

However, I believe that Section 75-2905, R. C. M., 1947, which provides an alternate procedure in lieu of a fine is perhaps a more effective procedure to compel a parent to send his child to school. This section provides that the truant officer may notify the parent in writing of the nonattendance of his child and of the consequences of continued nonattendance, and require the parent to cause the child to attend school within two days from the date of the notice. The statute then

provides as follows:

> "Upon failure to do so, the truant officer shall make complaint against the parent, guardian, or other person in charge of the child, in any court of competent jurisdiction in the district in which the offense occurs for such failure, and upon such conviction, the parent, guardian or other person in charge shall be fined not less than five dollars nor more than twenty dollars; or the court may, in its discretion, require the person so convicted to give bond in the penal sum of one hundred dollars, with sureties, to the approval of the court, conditioned that he or she will cause the child under his or her charge to attend some recognized school within two days thereafter, and to remain at such school during the term prescribed by law; and upon failure or refusal of any parent, guardian, or other person to pay said fine and costs, or furnish said bond, according to the order of the court, then said parent, guardian or other person shall be imprisoned in the County jail not less than ten days nor more than thirty days."

Thus, through the institution of court proceedings may the County Superintendent coerce parents into sending their children to school, providing that the children are within the school age.

Very truly yours,

ARNOLD H. OLSEN,
Attorney General

Opinion 64 - 1952

Held: That the residence of an elementary school pupil for purposes of payment of tuition and of transportation shall be that place where the pupil resides with his family for at least eighty days during the calendar year, when school is not in session.

February 8, 1952

Miss Mary M. Condon
Superintendent of Public Instruction
State Capitol Building
Helena, Montana

Dear Miss Condon:

You have requested my opinion concerning the applicable statute for determining the residence of pupils for the payment, by school districts, of tuition and transportation.

Section 75-1630, Revised Codes of Montana, 1947, as amended by Chapter 207, Laws of 1951, authorizes the attendance of pupils of the elementary schools in districts other than that of residence and states:

> "For the purpose of determining the residence of such child the place where the father resides and earns the major portion of the living for his family, shall be used."

This quoted portion of Section 75-1630 was first made a part of the section by Chapter 203, Laws of 1943, and the 1951 amendment to the section did not alter this portion of the statute.

Section 75-3405, R. C. M., 1947, was amended by Chapter 189, Laws of 1951, and the new matter added to the section included:

> "For the purposes of this act (transportation statute) and also for the purposes of paying tuition, residence shall be defined as that place where the applicant resides with his family for at least eighty (80) days during the calendar year, when school is not in session."

It is apparent that the last definition of residence for elementary school pupils was given to us by the amendment above quoted to Section 75-3405, R. C. M., 1947. While the 1951 legislature amended both sections, yet no change was made in Section 75-1630, pertaining to residence and this definition must be considered as having been enacted in 1943. Recognition of such a construction is found in State ex rel. Henderson v. Dawson County, 87, Mont. 122, 286 Pac. 1265, where it was said:

> "Where a section or a part of a section of a law is amended, it is not to be considered as repealed and re-enacted in its amended form, but the portions which are not altered are to be considered as having been the law from the time they were enacted."

A rule that is also helpful in construing these conflicting statutory provisions, is found in Nichols v. School District No. 3, 87 Mont. 181, 287 Pac. 624, in which case the court stated:

> "In the construction of an amendatory Act it will be presumed that the legislature, in adopting it, intended to make some change in the existing law... and the court will endeavor to give some effect to the amendment."

In view of the fact that the legislature, by its amendment to Section 75-3405 gave a new rule for the determination

of a child's residence and the new rule is inconsistent with the rule which had been the law for years before, it must be held that the latest definition in time controls, and the prior rule was repealed by implication.

It is therefore my opinion that the residence of an elementary school pupil for the purposes of payment of tuition and of transportation shall be that place where the pupil resides with his family for at least eighty days during the calendar year, when school is not in session

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 65 - 1952

Held: 1. The trustees of a school district have the power to enter into a contract with the parents of non resident students for the payment of tuition.

2. It is the duty of the trustees of a school district to budget for and pay tuition for resident children who attend elementary school in another district if the county superintendent and the trustees of the school district of the school to be attended consent in writing to such attendance.

February 9, 1952

Mr. John M. McCarvel
County Attorney
Deer Lodge County
Anaconda, Montana

Dear Mr. McCarvel:

You have requested my opinion concerning the validity of a contract between a school district and the parents of school children. You advise me that the children attend elementary school in a district where they do not reside, and the contract was entered into between the district and the parents for the payment of tuition by the parents for the children. You also state the trustees of the district of the residence of the children have refused permission.

Section 75-1630, R. C. M., 1947, as amended by Chapter 267, Laws of 1951, provides for the transfer of funds between school districts for the payment of tuition of transfer elementary children. This section provides in part:

> "Children may attend public elementary schools in districts in the county outside of the district in which they reside,....when written permission is secured from the board of trustees of the district in which they are to attend school and when written permission has been given by the county superintendent of schools of the county in which the children reside.
>
> "When approval of attendance in another district within or without the county has been granted, the district in which such child resides shall pay to the school district where such child attends, an amount based on the following tuition rates...."

From the above quoted it is apparent that the consent of the trustees of the district of residence is not a prerequisite for the attendance of the children in another district.

Under the facts submitted the consent for attendance was secured from the trustees of the district operating the school to be attended and of the county superintendent and therefore it is the obligation of the district of residence to pay the amount of tuition as fixed in the schedule set out in Section 75-1630, as amended. A similar conclusion was reached in the case of McClerkin v. San Mateo School District. 4 Cal. (2d) 363, 49 Pac. (2d) 830, 102 A.L.R.

If the county superintendent had not consented in writing to the attendance, the trustees of the district where the children wished to attend elementary school could enter into a contract for tuition, as Section 75-1632, R. C. M., 1947, as amended by Chapter 207, Laws of 1951, grants the power to a board of trustees:

"To determine the rate of tuition of non-resident pupils according to the provisions of Section 75-1630, R. C. M. , 1947, as amended."

That a school district may charge tuition for non-resident pupils and exclude them for non-payment was recognized in Peterson v. School Board, 73 Mont. 442, 236 Pac. 670.

While the trustees of a school district have the authority to charge tuition for non-resident elementary pupils attending their district, yet under the facts you submitted the requirements of Section 75-1630, R. C. M., 1947, as amended, have been satisfied. It is the obligation of the district of the residence of the pupils to pay the tuition and the parents should be relieved of this obligation.

It is therefore, my opinion:

1. The trustees of a school district have the power to enter into a contract with the parents of non-resident students for the payment of tuition.

2. It is the duty of the trustees of a school district to budget for and pay tuition for resident children who attend elementary school in another district if the county superintendent and the trustees of the school district of the school to be attended consent in writing to such attendance.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

CHAPTER REFERENCES

The following official opinions of the attorney general can be found in Volume 22 of the Report and Official Opinions of the Attorney General.

Opinion 11 - 1947
Opinion 73 - 1947

The following official opinion of the attorney general can be found in Volume 23 of the Report and Official Opinions of the Attorney General.

Opinion 135 - 1950

The following official opinions of the attorney general can be found in Volume 24 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 64 - 1952
Opinion 65 - 1952

CHAPTER V

HIGH SCHOOL DISTRICTS

Opinion 135 - 1946

Held: A high school district which was heretofore created under the provisions of Sections 1301.1 to 1301.6, R. C. M., 1935, as amended, has the power and authority to issue bonds for construction purposes.

March 16, 1946

Mr. D. W. Doyle
County Attorney
Pondera County
Conrad, Montana

Dear Mr. Doyle:

You have requested my opinion concerning the following facts:

Pondera County has been divided into high school districts under the provisions of Section 1301.1 to 1301.6, R. C. M., 1935, as amended; School District No. 10, previous to the decision maintained a district high school and the high school district of which district No. 10 is a part proposes to issue bonds.

In your request for an opinion you called attention to Opinion No. 6, Volume 21, Report and Official Opinions of the Attorney General, which held that Section 1301.1 to 1301.6, R. C. M., 1935, were enacted as Chapter 47 of Ex. Laws of 1933, and that the act was passed as an emergency measure. The facts under consideration in the above opinion differ

from those presented here in that it was there proposed to create high school districts. Your county has already been divided into high school districts and the districts once created continue to exist under the statute with the powers granted to them at the time of their creation.

Chapter 47 was enacted for the purpose of aiding a building program and to take advantage of federal aid. The districts created were given the power to incur indebtedness and there was no limit to the time for the exercise of this power. Indebtedness by the issuance of bonds may still be incurred by the district.

It is therefore, my opinion that a high school district which was heretofore created under the provisions of Sections 1301.1 to 1301.6, R. C. M., 1935, as amended, has the power and authority to issue bonds for construction purposes.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 157 - 1946

Held: A common school district's proportionate share of a high school building district's indebtedness must be included in the computation of the limit of indebtedness of the common school district.

May 16, 1946

Mr. D. W. Doyle
County Attorney
Pondera County
Conrad, Montana

Dear Mr. Doyle:

You have requested my opinion whether a common school district which is included in a high school district created under Sections 1301.1 to 1301.6, R. C. M., 1935, will be limited in incurring indebtedness by its proportionate share of the indebtedness of the high school district.

Section 6 of Article XIII of the Montana Constitution, and Section 1224.2, R. C. M., 1935, limit the indebtedness of a school district to three per cent of the value of the taxable property therein. However, it is arguable that the indebtedness of the high school district is not that of the component common school districts that they are separate legal entities. However, in Pierson v. Hendrickson, 98 Mont, 244, 38 Pac. (2d) 991, our court recognized that common school districts were consolidated for a limited purpose and then considered the precise problem presented by your question without deciding the point. The court said:

> "It is next contended that Chapter 47 is in conflict with section 6, Article XIII, of the Constitution, which limits the indebtedness of a school district to three per cent of the value of the taxable property therein, because of the possibility of including in the new district a common school district already indebted to such an extent that its proportion of the proposed bond issue, added to its existing indebtedness, would exceed the constitutional limit. The record discloses without controversy that, if the indebtedness proposed by the bond issue involved here were divided between the various common school districts composing the new district in proportion to the assessed value of the property in such districts and added to the existing indebtedness of each of such common districts respectively, the indebtedness of each would still be less than three per cent of the assessed value of its taxable property. Assuming, without deciding, that, in determining whether any common school district had exceeded its constitutional limit of indebtedness, the indebtedness of the proposed bond issue must be allocated in the manner above stated, it follows that plaintiff and no other individual taxpayer of any of the common school districts here involved and none of the common school districts themselves can raise the question here attempted to be raised, for, as to them, the fact is not open to this objection. Only those adversely affected by an unconstitutional act can question its validity..."

The reason for Section 6 of Article XIII of our Constitution was expressed in Butler v. Andrus, 35 Mont. 575, 90 Pac. 785, where the court said:

> "Experience has demonstrated that those who control municipal governments are not always honest, discreet, and conservative citizens, and that when there is no restraint upon their power to contract indebtedness, extravagant courses frequently result in imposing intolerable burdens of taxation upon the people of their municipalities."

The purpose of the section of the Constitution is to limit the burden of taxation, and to permit the high school

district bonded indebtedness to be excluded from the computation of the indebtedness of the common school districts would violate the spirit of the constitutional prohibition.

It is therefore my opinion that a common school district's proportionate share of a high school building district's indebtedness must be included in the computation of the limit of indebtedness of the common school district.

Sincerely yours,

R. V. BUTTOMLY,
Attorney General

Opinion 175 - 1946

Held: High school students who attend high school outside of the county of their residence and who reside closer to a high school in the county of their residence than the one attended are not entitled as a matter of right to permission for transfer and resulting payment of such funds although the same students may be entitled to transportation.

June 27, 1946

Mr. Chester E. Onstad
County Attorney
Powder River County
Broadus, Montana

Dear Mr. Onstad:

You have requested my opinion asking if funds must not be transferred by a school district for students who attend high school in a county adjoining that of their residence when they reside closer to a high school in the county of their residence than a high school in an adjoining county.

Your question is answered by the provisions of Section 1262.81, Revised Codes of Montana, 1935, as amended by Chapter 217, Laws of 1939, and Chapter 219, Laws of 1943, which section provides that the transfer of students:

> "...must be authorized by the county superintendent of schools of the county of his residence when a pupil lives more than three (3) miles from the nearest high school in the county of his residence and more than one and one-half (1 1/2) miles from an established bus route operated by such high school, and closer to a high school of an adjoining county than to any high school located in the county of his residence, and when proper application has been made to the county superintendent of schools, not later than October 15th, by the parent or guardian of the pupil for who such transfer is desired (Emphasis mine.)

The emphasized portion of the above quoted section indicates that it is not mandatory for the County superintendent of Schools to authorize the transfer unless there is a high school in the adjoining county closer to the student's residence than in the county of residence. Section 9 of Chapter 152, Laws of 1941, as amended by Chapter 116, Laws of 1945, states the rules for eligibility for transportation and contains similar distance requirements for transportation to those above quoted, but does not have the prohibition that if a high school in the county of residence is closer than the one in the adjoining county, it is not mandatory to furnish transportation.

It is therefore my opinion that high school students who attend high school outside of the county of their residence and who reside closer to a high school in the county of their residence than the one attended are not entitled as a matter of right to permission for transfer and resulting payment of such funds although the same students may be entitled to transportation.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 115 - 1948

Held: The commission which divides the county into high school building districts under the provisions of Chapter 275, Laws of 1947, must divide the whde county without omitting any portion and may create high school buildi ng districts which, at the timeof the division, do not have high schools.

April 27, 1948

Mr. Denzil R. Young
County Attorney
Fallon County
Baker, Montana

Dear Mr. Young,

You have requested my opinion as to whether a portion of the county may be left out of the division of the county into high school building districts by the commission which proceeds under the provisions of Chapter 275, Laws of 1947. You advise me that the citizens in a part of your county object to the inclusion of the area in which they live in either of two proposed high school building districts, as the citizens contemplate the re-establishment of a high school in that area.

Section 2 of Chapter 275, Laws of 1947, states in part:

> "In all counties having a high school, or high schools, a commission consisting of the county commissioners and the county superintendent of schools shall at the request of any high school board of trustees in the county, divide the county into high school districts for the purpose of this act, after hearing."

It is to be noted that the above quoted provides that

the commission shall "divide the county into high school districts," and the use of such phrase means the whole county without omission must be divided. To permit a portion of the county to be left out of the division would lead to abuses and in many instances, unfair taxation. All of the provisions of Chapter 275 give the commission broad powers and while the initial step for the division of the county is instituted by the trustees of a high school within the county, yet there is no requirement that all of the districts created by the commission have a high school in existence at the time of the division.

In your letter you state that a high school was in existence in the area from which protests arise and that the electors in such portion of your county desire that their community be designated as a high school district with the view that a high school will be established. As was observed in Pierson v. Hendrickson, 98 Mont. 244, 38 Pac. (2d) 991, the purpose of the school building district law is to permit consolidation of common school districts for construction purposes. Section 5 of Chapter 275 states specifically that one of the purposes of the act is to permit construction of high schools. The creation of a high school building district which does not have a high school in existence at the present time would encourage the establishment of a high school in that the construction would be made easier. In fact it appears that a liberal interpretation

of this law would encourage the improvement of our school system.

The previously quoted portion of Section 2 of Chapter 275, indicates the legislative intent that an existing high school is not necessary for each high school district. The section reads, in part, that "In all counties having a high school...a commission...shall...divide the county into high school district..." In other words, the language used contemplates that counties having only one high school shall be divided, if the proper request is made, and the fact that there is only one high school would not preclude such division.

In determining the boundaries of a high school building district, since the entire county is being divided, a district may be created wherein no high school at present exists, and no immediate plans to build have been formulated, but which building district is to be utilized when conditions warrant a building program.

The prohibition found in Section 1023, Revised Codes of Montana, 1935, against the creation of school districts between March and July applies to the districts authorized by Chapter 275.

The legislature has given us this law and it is mandatory on the part of the commission. The law as it stands may not be desirable, but the relief is to apply to the legislature to amend or repeal.

It is therefore, my opinion that the commission which divides the county into high school building districts under the provisions of Chapter 275, Laws of 1947, must divide the whole county without omitting any portion and may create high school building districts which, at the time of the division, do not have high schools.

Sincerely yours,

R. V. BUTTOMLY
Attorney General

Opinion 29 - 1949

Held: The boundaries of a high school building district are not altered by the merger of two common school districts and the boundaries of an established high school building district can be altered only in the manner provided in Section 1, Chapter 130, Laws of 1949.

June 27, 1949

Mr. Charles L. O'Donnell
County Attorney
Chinook, Montana

Dear Mr. O'Donnell:

You have requested my opinion concerning the boundaries of high school building districts within your County. You advise me that several common school districts were consolidated subsequent to the division of your County into high school building districts with the result that the two common districts are in two high school building districts.

As your County was divided into high school building districts by an order of the commission made on the 18th day of July, 1938, the statutes which were applicable at that time were Section 1301.1 to 1301.6, Revised Codes of Montana, 1935, as amended by Chapter 16, Laws of 1937. Section 1301.2 as amended, provided in part:

> "No common school districts shall be divided for the purposes of this act but must be made a part of a high school district in its entirety."

The above quoted prohibition of the statute was not violated at the time of the creation of the high school

building districts. The subsequent consolidation of two common school districts or the annexation of one common school district to another might well result in one common school district being located in two high school building districts. Chapter 275, Laws of 1947, by providing that common school districts shall not be divided, does not preclude the subsequent merger of districts and the chapter does not provide for the change of the boundaries of the high school building district once it is established.

In McNair v. School District No. 1, 87 Mont. 423, 288 Pac. 188, our court held that the Board of Trustees of a school district may exercise only those powers expressly conferred upon them by statute and such as are necessarily implied. The court said:

"The statute granting a power must be regarded both as a grant and a limitation upon the powers of the Board."

The quoted rule applies with equal force to the commission which acts under the provisions of Chapter 275, Laws of 1947. No provision was made for the redivision of a county and the alteration of high school district boundaries until the enactment of Chapter 130, Laws of 1949, which authorizes the commission to meet in accordance with the procedure found in Chapter 275 and alter the boundaries previously established.

It is thus apparent from this legislative history that the

boundaries of high school districts, once having been established, can be altered only by the commission acting under Chapter 130, Laws of 1949, and that the merger of common school districts will not result in a change in the boundaries of established high school building districts.

In your letter you call attention to Section 3, Chapter 130, Laws of 1949, which provides that the trustees of a school district within which a high school is located may call a meeting composed of the Board of Trustees of the high school district and the chairmen of the boards of all common school districts included within the high school district for the purpose of considering the calling of an election to vote upon the question of an extra levy for the maintenance and operation of the high school. It would appear that the chairman of a common school district, located in two high school building districts, might be asked to attend two such meetings. Such a situation would not invalidate either of the elections and there is nothing to prevent a chairman of such district from acting in two of such meetings on the extra levy problem as he would represent an area affected by each of the two meetings.

The preparation of an assessment roll for a high school district which shares a common school district with another high school building district will be complicated and require additional work on the part of the assessor. However, it will

be necessary to prepare such an assessment roll so that a proper computation can be made for the purpose of voting on the question of an extra levy as the records on hand would not give this information, also the valuation of the high school district must be ascertained for the determination of the levies on the area and the assessment roll will give the valuation.

It is therefore, my opinion that the boundaries of a high school building district are not altered by the merger of two common school districts and that the boundaries of an established high school building district can be altered only in the manner provided in Section 1, Chapter 130, Laws of 1949.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 34 - 1949

Held: 1. County High Schools come under the provisions of Section 3 of Chapter 130, Laws of 1949, providing for special tax levies for high school purposes.

July 8th, 1949

Mr. Robert F. Swanberg
County Attorney
Missoula, Montana

Dear Mr. Swanberg:

You have requested my opinion concerning the manner of holding an election for an extra levy for the maintenance and operation of a County high school.

In considering your problem it is important to note the statutory background for such a levy. Prior to 1947 no provision was made by the Legislature for an extra levy, for County high schools, although trustees of district high schools could under Section 1263.5, Revised Codes of Montana, 1935, as amended, call an election in the district for such an extra levy. However, in 1947, the Legislature enacted Chapter 274, Laws of 1947, which authorized a special election for an extra levy for County high schools for the following two school years. Chapter 274, by the specific language contained in Section 4 of the act would not apply to budgets for school years subsequent to June 30, 1949. The result is that an extra levy for the maintenance of county high schools must be found in subsequent legislation if there is to be such a tax. Section 3, Chapter 130, Laws of 1949, reads as follows:

> "Whenever the Board of Trustees of the local school district within which the high school is situated shall deem it necessary to raise money for high school purposes in addition to its revenues from County and State apportionments, a meeting of the Board of Trustees of the high school district together with the chairmen of the Boards of Trustees of all common school districts included within the high school districts shall be called and held to consider the calling of an election to vote upon the question of approving a special levy for high school purposes. Provided, that any other member designated by the Board of Trustees of any such common school district may represent such district in place of the chairman thereof. If a majority of the Board of Trustees of the high school district and the designated representatives of said common school districts attending such meeting shall determine that the proposed expenditures are necessary for the proper maintenance and operation of such high school, said trustees of the high school district shall ascertain and determine the number of mills required to be raised by special levy, and shall call an election for the purpose of submitting the question of making such additional levy to the qualified electors who are taxpayers upon property within the high school district, and if approved by a majority vote of all the taxpayers voting at such election, the result of said election shall be certified to the Board of County Commissioners and the levy approved by such majority vote shall be made upon all property within said high school district."

The first sentence of the above quoted, seemingly limits the extra levy to district high schools situated in high school building districts, but such a limited interpretation would preclude County High Schools and it was such County high schools the Legislature had in mind in enacting Chapter 274, Laws of 1947, as district high schools have always had available an extra levy as authorized by Section 1263.5, Revised Codes of Montana, as amended. To construe Section 3 of Chapter 130, Laws

of 1949, as limited to district high schools located in high school building districts would constitute a complete reversal of Legislative intent as previously evidenced by the enactment of Chapter 274, Laws of 1947. It is in reality the County high schools which have needed appropriate legislation for calling an election to authorize an extra levy, and it is reasonable to hold that the authority is to be found in Chapter 130, Laws of 1949. The latter portion of Section 3, Chapter 130, which states, "If a majority of the Board of Trustees of the high school district and the designated representatives of said common school districts...shall determine that the proposed expenditures are necessary...said trustees of the high school district shall ascertain the number of mills required... and shall call an election..." is broad enough in the language used to cover County high schools as well as district high schools.

A rule of construction that is helpful in arriving in the meaning of Section 3, Chapter 130, is found in the case of: In re Wilson's Estate, 102 Mont. 178, 56 Pac. (2d) 733:

> "The intention of the lawmaker is to be deducted from a view of every material part of the statute."

Application of this rule to the statute under consideration must logically lead to the conclusion that trustees of a high school, whether it be a County or a District high located within a high school building district shall have

the right to call a special election in the manner provided by law for an extra levy for support and maintenance of the high school.

It is therefore, my opinion that an election may be called for the purpose of submitting the question of an extra levy for the support and maintenance of a County high school located within a high school building district under the provisions of Section 3, Chapter 130, Laws of 1949.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 37 - 1949

Held: Chapter 275, Montana Session Laws of 1947, which provides for creation of High School Districts is mandatory in terms and leaves no discretion in the Commission, consisting of the Board of County Commissioners and the County Superintendent of Schools, as to the creation of such Districts. The Districts must be established if requested by a High School Board of Trustees in the County.

July 21st, 1949

Mr. John J. Cavan
County Attorney
Wheatland County
Harlowton, Montana

Dear Mr. Cavan:

You have requested my opinion upon the following question:

> "Under Chapter 275, Montana Session Laws of 1947, providing for the establishment of High School Districts, may the Commission consisting of the Board of County Commissioners and the County Superintendent of Schools exercise discretion as to the creation of such High School Districts?"

Chapter 275, Montana Session Laws of 1947, repealed Sections 1301.1 to 1301.6, Revised Codes of Montana, 1935, as amended, and contains the present law as to the creation of High School Districts, Section 2 of Chapter 275 reads in part as follows:

> "In all counties having a high school, or high schools, a Commission consisting of the County Commissioners and the County Superintendent of Schools shall at the request of any High School Board of Trustees in the County, divide the County into High School Districts for the purpose of this Act, after hearing. That the

> Commission shall fix the time, date and place, and at such time, date and place hold a public hearing of the requested division of the County into High School Districts, at which hearing any interested person may appear and be heard concerning the requested division...(Emphasis mine.)

If the above quoted Section is held to be mandatory in its terms then the Board of County Commissioners and the County Superintendent of Schools cannot exercise any discretion as to the creation of the High School Districts. The wording of the statute is that the Commission "shall" divide the County into High School Districts at the request of any high school board of trustees.

The question as to how the courts will interpret the word "shall" in a statute has arisen many times in the past. The general rule is stated in 50 Am. Jur., Statutes, Section 28, p. 49-50, as follows:

> "The intention of the Legislature as to the mandatory or directory nature of a particular statutory provision is determined primarily from the language thereof. Words or phrases which are generally regarded as making a provision mandatory, include "shall" and"must"..."

Further, in Section 30 under Statutes at pp. 51-52 of 50 Am. Jur. it is said:

> "...However, it should be helpful to keep in mind the fundamental rule that ordinarily the words "may" and "shall" or "must" are not used interchangeably or synonymously, but are given their ordinary meaning. When the use of the words in other than their ordinary meaning is intended, the intention to do so must clearly appear."

In the case of State ex rel. McCabe v. District Court,

106 Mont. 272, 76 Pac. (2d) 634, the Montana Supreme Court had under consideration the interpretation of the word "must" in a statute holding that the District Judge must appoint a special administrator under certain circumstances. While the court in that case held that "must" was not mandatory but only permissive, it was made clear that the case fell into the exception to the general rule. On page 277 of the decision the court said:

> "We are reluctant to contravene or construe away terms of a statute which in themselves are mandatory upon their face, except where the intent and purpose of the legislature are plain and unambiguous and clearly signify a contrary construction; the synonymous terms 'must' and 'shall' in that connection, being generally interpreted as mandatory, and the term 'may' being generally construed as permissive or directory only."

The latest consideration by the Montana Supreme Court as to whether a statute is mandatory or directory is the case of State ex rel. Sullivan v. District Court,_____Mont._____,196 Pac. (2d) 452. The court construed Section 11702, Revised Codes of Montana, 1935, dealing with removal of public officers, and held that the portion of Section 11702 which said "the court must cite the party charged to appear before the court at a time not more than ten or more than ten nor less than five days from the time the accusation was presented" was directory and not mandatory. The court gave two reasons for its decision, (1) that statutory provisions as to precise time are many times not regarded as of the essence but are regarded as directory merely and (2) a statutory

provision is generally regarded as directory where a failure of performance will result in no injury or prejudice to the substantial right of the interested persons, and as mandatory where such injury or prejudice will result. The Sullivan case is distinguishable from the instant situation on both counts. Here we are not concerned with a statutory provision as to time, and secondly it cannot here be said that a failure of performance will not result in injury or prejudice to the parties requesting the division into High School Districts. Thus the Sullivan case is not controlling in the question at hand and need not govern the decision in this opinion.

Accepting as a general rule the proposition that "shall" is mandatory in nature unless it clearly appears from the remainder of the statute that a permissive use was intended, all that remains to be done is to determine if anything in Chapter 275, Montana Session Laws of 1947, indicates that the Commission is to have any discretion in the establishment of High School Districts.

I find nothing in Chapter 275 to take it out of the general rule. While the Commission does have discretion as to the territorial aspects of the division, i. e., how many districts shall be created and how much land shall be placed in each one, it has no discretion as to whether or not it will create the districts. Chapter 275 makes the creation mandatory.

Therefore, it is my opinion that the direction in Chapter 275, Montana Session Laws of 1947, to the Commission consisting of the Board of County Commissioners and the County Superintendent of Schools to divide the County into High School Districts at the request of any High School Board of Trustees is mandatory and not permissive and therefore such Commission may not exercise any discretion as to whether or not such districts shall be created.

Very truly yours,

ARNOLD H. OLSEN,
Attorney General

Opinion 141 - 1950

Held: The Board of Trustees of a school district maintaining a district high school has the power to request the division of the County into high school building districts under Section 75-4602, Revised Codes of Montana, 1947.

December 21st, 1950

Mr. Charles B. Sande
County Attorney
Yellowstone County
Billings, Montana

Dear Mr. Sande:

You have requested my opinion concerning the right of the Board of Trustees of a school district maintaining a district high school to petition for the formation of high school building districts within your County.

Your problem is the result of the language used in Section 75-4602, Revised Codes of Montana, 1947, which reads as follows:

> "In all counties having a high school, or high schools, a commission consisting of the County Commissioners and the County Superintendent of Schools shall at the request of any High School Board of Trustees in the County divide the County into high school districts for the purpose of this act, after hearing."

It would appear at first blush from the above emphasized portion that the power to request the division of a County into high school districts is limited to the trustees of a County High School as Section 72-4103, Revised Codes of Montana, 1947, provides for an independent Board of Trustees for County High Schools. District High Schools do not have trustees designated "High School Board of Trustees," as school

districts maintaining high schools are under the control of trustees for the district which includes elementary schools, Section 75-4101, Revised Codes of Montana, 1947. However, the history of the High School District law throws light on the meaning of Section 75-4602. The first statutory authority for the creation of high school building districts is to be found in Chapter 47 of the Extraordinary Session of 1933-34. Section 2 of this Act limited the division of a county into high school districts to those counties having County High Schools. Chapter 16 of the Laws of 1937 amended Section 2 of the original act to permit the establishment of high school districts "in all counties having a high school." The case of Pierson vs. Hendrickson, 98 Mont. 244,38 Pac. (2d) 991, held that Chapter 47, Extraordinary Sessions 1933-34, was valid as an emergency measure and Chapter 275, Laws of 1947, reenacted the High School Building law to make it a permanent part of our school law, with amendments which are not material here. The Legislature in amending what is now Section 75-4602 by permitting the creation of high school districts in counties which do not have County High Schools must have intended that the initial petition for the division of a county into high school districts could come from the trustees of any district maintaining a high school, otherwise, the amendment would have been a nullity. The majority of the counties in Montana do not have County High Schools.

A rule of construction that is pertinent to the problem presented is found in Mitchell vs. Banking Corporation, 95 Mont. 23, 24 Pac. (2d) 124, where the court said:

> "It will be presumed that the Legislature in amending an existing law intended to make some change therein, and therefore, the courts will endeavor to give some effect to the amendment."

Also, it is apparent that the Legislature did not intend to limit the power to request creation of High School Districts to the Boards of Trustees of County High Schools from the use of the phrase in the statute, "any High School Board of Trustees in the County." The word "any" is often construed to mean "all" or "every", 3 C. J. 232, and such construction would indicate that trustees who administer a district maintaining a high school could petition because there can be only one County High School and the comprehensive word "any" grants authority to more than one school governing body.

It is, therefore, my opinion that the Board of Trustees of a school district maintaining a district high school has the power to request the division of the County into High School Building Districts under Section 75-4602, Revised Codes of Montana, 1947.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 38 - 1951

Held: Upon the abolishment of a county high school the property of the county high school should be conveyed to the school district which establishes a high school rather than to the high school building district. The conveyance of the property should be to the board of trustees and to their successors in office.

August 29th, 1951

Mr. Howard W. Heman
County Attorney
Teton County
Choteau, Montana

Dear Mr. Heman:

You have requested my opinion concerning the title to school property. You advise that the county high school in your county was abolished and a district high school established. You also advise me that the district high school is located within a high school building district which latter legal entity by means of a bond issue furnished a large portion of the funds to purchase the property of the county high school. Your specific question is whether or not the conveyance of the property should be made to the high school district or to the school district.

In answering your question it is necessary to consider the statutory procedure for the creation of a high school. Section 75-4183, Revised Codes of Montana, 1947, provides that the trustees of the district may establish a high school with the

approval of the Superintendent of Public Instruction. Section 75-4139 states what should be included in the petition of the trustees to the Superintendent of Public Instruction and defines the necessary steps in the initial stages of establishing a high school. There is no statutory authority for the establishment of a high school by a high school building district. In fact, the high school building districts were first established for a limited purpose and this is stated in Section 75-4605, Revised Codes of Montana, 1947, which reads in part as follows:

> "This act shall not prevent the exercise of powers as elsewhere in the statutes of this state provided. It shall constitute an additional and cumulative method of borrowing money and of carrying out the powers herein authorized. The high school districts created under the provisions of this act are for construction, repair, improvement and equipment purposes only, and it shall not be construed so as to interfere with or repeal any existing laws relating to the maintenance or operation of high schools within the county."

Also, it is to be observed that Section 75-4601 provides in part:

> "In any county having a high school the board of trustees of the county high school, if there be one, and the boards of trustees of any school districts maintaining the high schools, are hereby designated as the boards of trustees of the respective high school districts established under this act."

As is made apparent by the above quoted portions of our statutes high school districts were originally created for "construction, repair, improvement and equipment purposes only."

A condition precedent to the incurring of any indebtedness or the expenditure of any money by a high school district is the existance of a high school. When a high school is in operation in a high school district the trustees who govern the school district in which the high school is located or the county high school, by virtue of their official position, become the high school district trustees. To convey property to a high school district would be inconsistent with the limited powers granted to such districts by our legislature. In Finley vs. School District No. 1, 51 Mont. 411, 153 Pac. 1010, the court said:

> "A school district is a public corporation, but with very limited powers. It may, through its board, exercise only such authority as is conferred by law, either expressly or by necessary implication."

There is no express grant of authority for a high school district to hold property in its corporate name. Section 75-4605, Revised Codes of Montana, 1947, previously quoted in part, designates the purposes for the creation of high school districts, however, this enumeration does not include the ownership of property. In fact a presumption is raised against such power by the omission.

Chapters 130 and 199, Laws of 1949, and Chapters 208 and 210, Laws of 1951, use high school districts for levies for the maintenance and operation of the high school located within high school districts which is a variance from and

an implied amendment to Section 75-4605, Revised Codes of Montana, 1947, but not such an increase in the powers that it might be concluded a high school district may be the grantee of real property.

Section 75-1624, Revised Codes of Montana, 1947, grants to the board of trustees of each school district broad powers over property of the district. This section states, " all conveyances of real estate made to the district or to the board of trustees thereof shall be made to the board of trustees of the district and to their successors in office."

It is not of material importance which district holds school property as the case of Pierson vs. Hendricksen, 98 Mont. 244, 38 Pac. (2d) 991, held:

> "The beneficial title of the school property is in the state."

It is, therefore my opinion that upon the abolishment of a county high school the property of the county high school should be conveyed to the school district which establishes a high school rather than to the high school building district. The conveyance of the property should be to the board of trustees and to their successors in office.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 108 - 1952

Held: A high school district cannot be established in that area of a joint district in which the high school is not located.

August 13th, 1952

Miss Mary M. Condon
Superintendent of Public Instruction
Capitol Building
Helena, Montana

Dear Miss Condon:

You have requested my opinion concerning the creation of a high school district consisting of the area of a joint school district within one county where the high school of the joint district is located in the area of the joint district within the adjoining county.

Under the provisions of Section 75-1814, Revised Codes of Montana, 1947, a joint district is defined as being a school district which lies partly in one county and partly in another. High school districts are established under the provisions of Chapter 46, Title 75, Revised Codes of Montana, 1947. Section 75-4602, Revised Codes of Montana, 1947, as amended by Chapter 188, Laws of 1951, provides that the commission shall divide the entire county into high school districts, "providing, that each high school district so formed must have one (1) or more operating, accredited high schools within its boundaries." This section also provides that if a high school district shall cease to have within its borders an operating high school then it shall be

annexed to one or more high school districts.

The commission which divides a county into high school districts is limited in its authority and jurisdiction to the area of the county. Specific directions are given in regard to joint districts as in Section 75-4602, as amended, it is stated, "the entire portion of a joint school district within the county shall be included within a high school district." This provision coupled with the provision that there must be an operating high school in each high school district precludes the commission from considering a high school which is not within the exterior boundaries of the county.

I realize that an additional tax burden will be placed on the taxpayers within the joint districts as they must contribute to the support of two high schools. Yet, the legislature in enacting the high school district law confined the authority of the commission to each county without regard to joint school districts operating high schools.

It is therefore, my opinion that a high school district cannot be established in that area of joint district in which the high school is not located.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 130 - 1952

Held: A high school which has been declared to be an isolated high school by the Board of Budget Supervisors is not entitled to state aid unless such high school has been accredited by the State Board of Education and designated by the board as a high school which should receive state aid.

The fact that state aid is not available to a non-accredited high school does not preclude the district from voting an extra levy for the purpose of maintaining a high school under the provisions of Section 75-3801, Revised Codes of Montana, 1947, as last amended by Chapter 210, Laws of 1951.

December 24, 1952

Mr. Norman R. Barncord
County Attorney
Wheatland County
Harlowton, Montana

Dear Mr. Barncord:

You have requested my opinion concerning the eligibility of a non-accredited high school in your county to receive state aid. You advise me that the high school in question has been approved as an isolated high school by the budget board of your county.

In answering your question it is necessary to consider Section 2 of Chapter 199, Laws of 1949, which provides for state aid to the public schools throughout Montana. Section 1 of Chapter 199 specifies that the state's contribution shall be determined on the basis of need for assistance of

the various school districts. This financial aid is allocated on the basis of "average number belonging" which in substance is the attendance for the previous year. Section 2 of Chapter 199, as amended by Chapter 107, Laws of 1951, precludes the inclusion of pupils in a non-accredited school in the computation of the amount of state aid to a school district. The portion of Section 2 of Chapter 199, as amended which prevents state aid to non-accredited schools reads as follows:

> "The average number belonging of secondary pupils of a school district does not include the pupils of any high school which has not been accredited by the State Board of Education."

A high school which has an average number belonging(ANB) of less than twenty-five pupils receives state aid only if the State Board of Education has both accredited the high school and designated it as one which should receive state aid. This is specifically set forth in Section 3, Chapter 199, in the following provision:

> "A school having an ANB of less than twenty-five (25) pupils shall not receive any state aid unless it has been accredited by the State Board of Education and is designated by said board as a school which should receive state aid."

While it is true that under Section 16, Chapter 199, Laws of 1949, a high school with an average number belonging of twenty-four pupils or less may be approved as an isolated high school by the County Budget Board yet such a declaration does not itself alter the provision of Section 3, Chapter 199

Laws of 1949, that a high school having an ANB of less than twenty-five pupils must be both accredited and designated by the State Board of Education as being entitled to state aid.

It must be remembered that Section 75-107, Revised Codes of Montana, 1947, as amended by Chapter 92, Laws of 1951, specifically grants to the State Board of Education the power:

> "To prescribe standards of promotion to the high school department of all public schools of the state, and to accredit such high school as maintain the standards of work prescribed by the board on all such matters of promotion and accrediting. The board shall act upon recommendation given to it by the State Superintendent of Public Instruction."

If it were held that the Board of Budget Supervisors of a county by designating a high school to be isolated could thus accredit the high school then the above quoted portion of section 75-107, as amended, would be so modified as to take away the powers of the State Board of Education. Also, such an interpretation would violate the expressed language of Section 3, Chapter 199, which requires that a high school with an ANB of less than twenty-five pupils be accredited and designated as a school entitled to state aid.

However, the fact that state aid is not available to a non-accredited high school does not preclude a district from voting an extra levy for the purpose of maintaining a high school under the provisions of Section 75-3801, Revised Codes of Montana, 1947, as last amended by Chapter 210, Laws of 1951.

It is therefore my opinion that a high school which has been declared to be an isolated high school by the Board of Budget Supervisors is not entitled to state aid unless such high school has been accredited by the State Board of Education and designated by the Board as a high school which should receive state aid.

It is further my opinion that whenever aid is not available to a non-accredited high school district, this does not preclude the district from voting upon an extra levy for the purpose of maintaining a high school, under the provisions of Section 75-3801, Revised Codes of Montana, 1947, as last amended by Chapter 210, Laws of 1951.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 36 - 1953

Held: The act of a commission in establishing as a high school district the area of a joint district in one county does not result in creating as a high school district the area of the joint school district in the adjoining county. A high school district in the latter county can be established only by a commission acting in the latter county.

July 3, 1953

Mr. Walter T. Murphy
County Attorney
Mineral County
Superior, Montana

Dear Mr. Murphy:

You have requested my opinion concerning a joint school district which maintains a high school within your county. You advised me that Mineral County has been divided into high school building districts and one of such districts is composed of a common school district and that portion of a joint district lying in Mineral County. You asked specifically the effect of Chapter 237, Laws of 1953, which is the last amendment to Section 75-4602, R. C. M., 1947 and whether it is self executing so as to incorporate the area in the adjoining county into a high school district.

Section 75-4602 as amended, defines the method of dividing a county into high school district. The amendment to the section by Chapter 237, Laws of 1953, reads as follows:

> "...provided, further, that both parts of a joint district maintaining a high school may be considered as maintaining an operating high school, and as such each part of the joint district may, together with one or more adjacent common school

> districts whose pupils attend the high school in the joint district, be set aside as a high school district. Provided, that, such resulting high school district in the county where the joint district high school is not located, shall be responsible for its share of the joint district high school budgets as is arrived at by the following of the procedure outlined in Section 17, Chapter 199, Laws of 1949 (75-3618), and shall also be considered as a single high school district with the high school district of the joint district, wherein the high school is located for purposes of bonding as provided in Sections 75-4601 -4605, R. C. M., 1947, as amended by Chapter 188, Laws of 1951, and also for purposes of selecting additional trustees as provided for in Section 75-4601, R. C. M., 1947, as amended by Chapter 188, Laws of 1951...."

This new statute in substance authorizes the commission which divides a county into high school districts to establish as one of the high school districts the area of a joint school district in the county together with adjacent school districts.

As your county has been divided into high school districts, one of which is the joint school district with an operating high school, there is no problem within the county. However, the adjacent county in which the other part of the joint district is located has not been divided into high school districts and the amendment does not effect this area by establishing a high school district without the action of a commission dividing the county. The pertinent portion of Section 75-4602, as amended states:

> "In all counties having a high school, or high schools a commission consisting of the county commissioners and the county superintendent of schools shall at the request of any high school board of trustees in the county, divide the entire county into and establish one (1) or more high school districts for the purpose of this act, after hearing; provided, that each high school district so formed must have one (1) or more operation, accredited high schools within its boundaries;...."

It is to be noted that there must be one or more operating high schools in each high school district. The amendment which we have under consideration makes an exception to this requirement for the area in each county of a joint school district. This statutory provision which permits the part of a joint school district in each county to be created into a high school district is not self executing so that if one county does establish such a high school district such act will result in the area of the joint district in the adjoining county being formed into a high school district. Such a conclusion would violate the express language of the act that "...each part of the joint district may, together with one or more adjacent common school districts whose pupils attend the high school in the joint district, be set aside as a high school district..." Permission, not a mandate, is granted to the commission in each county to establish as a high school district the county's portion of a joint district whether or not a high school is in such area.

It is therefore, my opinion that the act of a commission in establishing as a high school district the area of a joint district in one county does not result in creating as a high school district the area of the joint school district in the adjoining county. A high school district in the latter county can be established only by a commission acting in the latter county.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 91 - 1954

Held: That a non-accredited high school is not entitled to receive an apportionment of the county ten mill special tax for high schools.

August 21, 1954

Mr. Edward J. Ober, Jr.
County Attorney
Hill County
Havre, Montana

Dear Mr. Ober:

You have requested my opinion concerning the eligibility of a non-accredited high school to receive an apportionment of the county ten mill special tax for high schools.

In Opinion No. 130, Volume 24, Report and Official Opinions of the Attorney General, this office held that a non-accredited high school is not entitled to state aid under the foundation financial program as defined in Chapter 36 of Title 75, Revised Codes of Montana, 1947. In arriving at the opinion reliance was placed on that portion of Section 75-3611, R. C. M., 1947, which reads as follows:

> "....The average number belonging of secondary pupils of a school district or of elementary pupils of a school district does not include the pupils of any high school or of any elementary school which has not been accredited by the state board of education..."

Under Section 75-3610, R. C. M., 1947, the state's contribution to the various schools is determined on the basis of financial need which is computed upon the basis of the average number belonging. In other words, the

measuring device for allocating money to school districts under the foundation program is "the average number belonging" of the school. The above-quoted portion of Section 75-3611, R. C. M., 1947, removes pupils of a school which has not been accredited from consideration under the foundation program. Similar reasoning prevents a non-accredited high school from receiving an apportionment of the special county high school tax as Section 75-3618, R. C. M., 1947, provides in part as follows:

> "After the deduction of transportation reimbursements provided by law, the proceeds of the county ten (10) mill common school levy and the proceeds of the county ten mill special tax for high schools shall each be separately distributed by the county superintendent to the respective districts in the county, and the county high school if there be one, in proportion to their needs under the foundation financial program..."

By the terms of this section, the county high school funds are distributed to each high school in proportion to their needs under the foundation financial program. As the foundation financial program is based on "the average number belonging" of each school and a non-accredited high school is precluded from receiving county apportionment of the special county high school tax. The ten mill levy is provided for in Section 75-4516.1, R. C. M., 1947.

It is, therefore, my opinion that a non-accredited high school is not entitled to receive an apportionment of the

county ten mill special tax for high schools.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 36 - 1955

Held: 1. Territory of one high school district may be transferred to another high school district, notwithstanding that there is outstanding bonded indebtedness as the territory transferred may be taxed for the payment of the bonds.

2. The legislature may provide a method for the change of boundaries of high school districts, as there is no constitutional restriction limiting the legislative power to enact a statute.

August 26, 1955

Mr. Leo H. Murphy
County Attorney
Teton County
Choteau, Montana

Dear Mr. Murphy:

You have requested my opinion as to the legality of the transfer of territory of a high school district to another high school district when the high school district from which the land is taken has outstanding bonded indebtedness. You have also asked if the transfer of territory is a violation of the corporate rights of a high school district.

In answering your first question the provisions of Section 75-4607, R. C. M., 1947, must be observed. This section permits the re-division of a county into high school districts including the alteration of the boundaries of existing districts. The authority of the legislature to make such

statutory provisions was recognized in State ex rel Redman vs. Meyers, 65 Mont. 124, 210 Pac. 1064, where the court stated:

> "A school district is merely a political subdivision of the state, created for the convenient dispatch of public business. In the absence of constitutional limitations, the legislature may create or abolish a district, or change or rearrange the boundaries of an existing district, and by the same token it may create joint districts from territory lying in adjacent counties..."

The above quoted principle has been recognized by our court in many subsequent cases.

Your second question is answered by the case of Fitzpatrick vs. State Board of Examiners, 150 Mont. 234, 70 Pac. (2d) 285, where it was held that counties and school districts can not rely on constitutional provisions available to private corporations in the following language:

> "These political subdivisions of the state may not claim the constitutional protection of the due process clause, or the provisions prohibiting the impairment of the obligation of existing contracts by legislative Act found in the federal and state Constitutions..."

However, where there are outstanding bonds of a high school district, the change of boundaries of the high school district will not relieve the territory which was within the high school district at the time of the issuance of bonds, from being taxed to retire the bonds. Section 11 of Article III of the Montana Constitution precludes the impairment of contracts of individuals. The contracts of bond holders

would be impaired if all the area included in the district at the time of the issuance of the bonds would not be subject to tax for the payment of the bonds. The larger valuation and taxing area gives greater protection for the payment of bonds. See Pass School District vs. Hollywood City School District, 146 Cal, 416 105 Pac. 122, and Geweke vs. Niles, 368 111. 463, 14 N. E. (2d) 482. Express statutes may change this rule, providing adequate protection is given for the payment of bonds, but there is no statute covering the indebtedness of high school districts when bounderies are changed.

The fact that the original area of a high school district will be subject to tax for payment of bonds does not preclude the change of boundaries of a high school district as provided in Section 75-4607, R. C. M., 1947. Obviously, the change of boundaries does not impair the contractual rights of bond holders if all of the area which was in the high school district at the time of the issuance of bonds remains liable for the payment of the bonds.

It is therefore my opinion that territory of one high school district may be transferred to another high school district, notwithstanding that there is outstanding bonded indebtedness as the territory transferred may be taxed for the payment of the bonds.

It is also my opinion that the legislature may provide

a method for the change of boundaries of high school districts, as there is no constitutional restriction limiting the legislative power to enact such a statute.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

CHAPTER REFERENCES

The following official opinions of the attorney general can be found in Volume 21 of the Report and Official Opinions of the Attorney General.

Opinion 135 - 1946
Opinion 157 - 1946
Opinion 175 - 1946

The following official opinion of the attorney general can be found in Volume 22 of the Report and Official Opinions of the Attorney General.

Opinion 115 - 1948

The following official opinions of the attorney general can be found in Volume 23 of the Report and Official Opinions of the Attorney General.

Opinion 29 - 1949
Opinion 34 - 1949
Opinion 37 - 1949
Opinion 141 - 1950

The following official opinions of the attorney general can be found in Volume 24 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 38 - 1951
Opinion 108 - 1952
Opinion 130 - 1952

The following official opinions of the attorney general can be found in Volume 25 of the Report and Official Opinions of the Attorney General. (To be Published)

Opinion 36 - 1953
Opinion 91 - 1954

The following official opinion of the attorney general can be found in Volume 26 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 36 - 1955

CHAPTER VI

PROFESSIONAL STAFF

Opinion 6 - 1947

Held: A county superintendent of schools cannot occupy such office and also hold the position of teacher.

January 4, 1947

Mr. Cecil N. Brown
County Attorney
Prairie County
Terry, Montana

Dear Mr. Brown:

You have requested my opinion as to whether the newly elected county superintendent of schools may continue in her job as a primary grade teacher.

Section 955, Revised Codes of Montana, 1935, provides:

> "The county superintendent shall have the general supervision of the Public schools in his County."

This supervisory power precludes the county superintendent of schools from being also a teacher in the schools in her county. In the case of Klinck v. Wittmer, 50 Mont. 22 144 Pac. 648, our Court said:

> "Offices are 'incompatible' when one has power of removal over the other...when one is in any way subordinate to the other...when one has power of supervision over the other...or when the nature and duties of the two offices are such as to render it improper, from considerations of public policy, for one to retain both."

It is apparent, that, under the above rule given us, the two positions are incompatible. However, the County Superintendent is an officer and a teacher is an employee and thus the application of the above rule might be questioned. In State ex rel. Barney v. Hawkins, 79 Mont.

506,257 Pac. 411, and in State ex rel. Nagle vs. Kelsey, 102, Mont. 8, 55 Pac. (2d) 685, our Court considered similar situations and the determining point in each case was whether the second position was in fact an office. In the Hawkins case the court held the auditor of the board of railroad commissioners was not a civil service officer and therefore the position could be held by a member of the legislature. In the Kelsey case the Court held that a member of the Montana Relief Commission was an officer and therefore the office could not be held by a member of the legislature. In neither of the cases was there a conflict as to the time element necessary to the performance of the duties involved and a violation of the rule of public policy stated in the above quoted portion of the case of Klinck v. Wittmer.

Section 430, Revised Codes of Montana, 1935, requires all officers to take an oath of office which is in part: "I will discharge the duties of my office with fidelity." Section 974, Revised Codes of Montana, 1935, provides:

> "The county superintendent of schools shall keep his office open every day when he is not engaged in the supervision of schools except holidays, provided when he has a deputy or clerk, his office shall be kept open every day in month except holidays."

If the county superintendent maintains her office as required, then she would not be able to teach because of her inability to be in two places at once. Also the

supervisory duties of the superintendent conflict with the duties of the teacher as a superintendent cannot, with logic, supervise herself in the performance of the work of a teacher. The conflict in duties renders it "improper" from consideration of public policy, for one to retain both."

It is therefore my opinion that a county superintendent of schools cannot occupy such office and also hold the position of a teacher.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 23 - 1949

Held: Under the provisions of the Teachers Retirement System, a member is compelled to retire on the 1st day of September following his or her seventieth birthday.

May 13th, 1949

Mr. R. W. Harper
Executive Secretary
Teachers Retirement System
Helena, Montana

Dear Mr. Harper:

You have presented the following factual situation for my opinion:

"S" a superintendent of schools, reaches the age of 70 years on July 9, 1949. The local Board of School Trustees desire to employ "S" for another year.

The questions presented by you are as follows:

(1) Is the school district in error in re-employing "S"?

(2) If they decide to re-employ him, what penalties could be invoked against the school district?

(3) Are there any other duties to fall upon the Retirement Board in this particular case, other than notification of both the teacher and school district?

(4) Should "S" be continued in employment, would he be required to continue payments to the System and would his salary for the last year be acknowledged in our records?

In answer to your first question, Section 6 of Chapter 87, Montana Session Laws of 1937, as amended by Section 2

of Chapter 137, Montana Session Laws of 1945, and Chapter 28, Montana Session Laws of 1949, must be considered. The amendment reads as follows:

> "That from and after the passage and approval of this act, any member in service who has attained the age of seventy years, during any school year shall be retired by said Retirement Board on the first day of September following his or her seventieth birthday."

The provisions of this Section are mandatory in that the Board of Administration of the Teachers Retirement Act must retire a member when such member reaches the age of seventy years. The word "shall" is generally construed as mandatory in its ordinary and common use. See 50 Am. Jur. (Statutes) Section 28. It is also a well recognized principal of law that the word "shall" is construed as must when a public body is directed to do certain acts. See 25 R.C.L. Section 15, (Statutes), p. 769.

Furthermore it is my opinion that the clear import of of Section 2, Chapter 137, Supra, indicates that the Retirement Board must retire a member of the System on September first following said member's seventieth birthday.

Assuming that a member is compelled to retire in light of the above statute and discussion, the next question is whether or not, under the hypothetical set of facts, "S" reached the age of seventy "during the school year."

Section 1061 of the Revised Codes of Montana, 1935, states that:

"The school year shall begin on the 1st day of July and end on the 30th day of June."

It is my opinion that "S" reached the age of seventy during the school year, namely July 9, 1949, consequently he must retire on September 1, 1949, and the school district would be in error to employ "S' after September 1, 1949. See also Volume 22 Attorney General's Opinions 52, page 70, for a further discussion of Section 6, Chapter 87, Montana Session Laws of 1937, as amended by Section 2, Chapter 137, Montana Session Laws of 1945.

In answer to your second question, the act itself does not provide for any penalty for a failure to observe the provisions thereof. However, under Section 1015, Revised Codes of Montana, 1935, as amended by Chapter 103, Montana Session Laws of 1943, the duties of a trustee are prescribed as follows:

"Every school board unless otherwise specifically provided by law shall have power and it shall be its duty:

1. To prescribe and enforce rules not inconsistent with law...

14. To require teachers to conform to the law."

Section 999, Revised Codes of Montana, 1935, prescribes the method for the removal of school trustees and is as follows:

"Any school trustee may be removed from office by a court of competent jurisdiction by law for removal of elective civil officers; provided, however, that upon charges being preferred and good cause shown, the board of county commissioners may suspend a trustee until such time as such charges can be heard in the court having jurisdiction thereof."

If the school trustees, or any member thereof, violates the provisions of the Retirement Act to the extent that such violation results in misconduct or malfeasance in office, then such trustees, or any one member, may be removed from office in the method prescribed by law.

In answer to your third question, Section 3, Chapter 87, Montana Session Laws of 1937, provides that it is the duty of the Retirement Board to assume responsibility for the general administration and proper operation of the retirement system.

In order to make effective the provisions of this act, it is my opinion that the Retirement Board has fulfilled its duty when both the school district and the teacher are notified in the manner provided for by law of any action taken by the Board.

Answering question Number four, it is my opinion that if a member is lawfully compelled to retire under Section 6 of Chapter 87, Session Laws of 1937, as amended by Section 2 of Chapter 137, Session Laws of 1945, and such retirement is ignored by the school trustees, the retired member cannot be compelled to continue payments to the retirement system, nor can his salary, after he has been lawfully retired, be acknowledged in your records.

In passing, I wish to bring to your attention the fact that I am aware that there still exists in Montana a shortage

of competent teachers in our public schools, and I am also aware that there are many employees of the system who are as competent after reaching seventy (70) years of age as many of the younger employees. However, the Legislature fixes the policy and enacts the laws under which the members of the Teachers Retirement System are to bound. Many of the provisions of the Retirement Act may seem to be unsound, especially in light of the economic conditions of today, but nevertheless the Attorney General's Office must interpret the law as the Legislature has passed it.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 122 - 1950

Held: That by virtue of Section 7, Chapter 142, Laws of 1949, teachers who held state secondary certificates on May 1, 1949, are entitled to receive life certificates providing they meet the statutory requirements fixed by Section 75-2504, Revised Codes of Montana, 1947, and the rules and regulations of the State Board of Education.

August 8, 1950

Miss Mary Condon
State Superintendent of Public Instruction
Helena, Montana

Dear Miss Condon:

You have requested my opinion concerning the application of Chapter 142, Laws of 1949 to the holders of State Teaching Certificates on May 1, 1949. You have asked in particular whether such teachers would be entitled to the type of certificates authorized under Section 75-2504, Revised Codes of Montana, 1947, which was repealed by Chapter 142, Laws of 1949.

Chapter 142, Laws of 1949, was approved by the Governor, March 1, 1949, and contained no recital that it would be effective on its passage and approval and as a consequence the provisions of Section 43-507, Revised Codes of Montana, 1947, applies and the act was not effective until July 1, 1949. Chapter 142 enumerates the classes of certificates for teaching which the State Superintendent of Public Instruction may issue and does not authorize the issuance of life

certificates. Section 75-2504, Revised Codes of Montana, 1947, was repealed by Chapter 142 and prior to its repeal and by its terms the State Superintendent was authorized to issue life certificates. Requirements for life certificates are similar for both elementary and secondary schools. In sub-section 6 of Section 75-2504, Revised Codes of Montana, 1947, the statute reads as follows:

Candidates for elementary life certificates must be holders of an elementary state certificate in full force and effect and must present satisfactory evidence of at least thirty-six (36) months of successful teaching experience in Montana during the life of a Montana elementary state certificate and satisfactory evidence of having secured subsequent to the issuance of the elementary state certificate such approvaed academic and professional training as may be prescribed and required by the rules and regulations of the State Board of Education.

Section 7 of Chapter 142, Laws of 1949, contains the following limitation on the provisions of Chapter 142:

No provision of this act shall affect or impair the validity of any certificate for teaching in force on May 1, 1949, or the rights and privileges of the holders by virtue thereof, save that any certificate may be suspended or revoked for any of the causes and by the procedures specified by law.

The question presented is the effect of Section 7, Chapter

142, Laws of 1949, and it is necessary to determine whether the types of certificates authorized by Section 75-2504, Revised Codes of Montana, 1947, which was repealed are available to holders of teaching certificates in force on May 1, 1949. The phrase "or the rights and privileges of the holders by virtue thereof" is the language to be construed.

It is reasonable to assume that the purpose of Section 7 was to preserve the right of a teacher who had taken additional academic training in order to receive a teaching certificate of a higher grade. The protection of the rights of those practicing a profession at the time of enacting a statute with different standards is in accord with general legislative practice. This was recognized in State v. Bays 100 Mont. 125, 47 Pac. (2d) 50, wherein our Supreme Court approved a statutory provision that barbers who were practicing their profession at the time of the enactment of a statute requiring examination were exempt from taking the examination. The court quoted from an earlier Montana case as follows:

> "The principle is the same as that involved in the multitudinous laws governing the right to practice professions and to engage in numerous specialty regulated lines of business activity. The erection of new standards of qualification by laws relating to them seldom contemplates the re-examination and re-licensing of those previously licensed and actually operating under the terms of a law in effect at the time of the issuance of the original license. The provision is not obnoxious to, but rather consonant with, generally recognized principles of fairness and justice."

The rule quoted above which recognizes the power of the legislative body to permit the granting of a license without examination to a practicing member of a profession is analogous to the rights granted to teachers by Section 7 of Chapter 142, Laws of 1949. The teachers who had taken additional academic training and who had complied with the rules of the State Board of Education in order to obtain a life certificate as provided in the law prior to Chapter 142, Laws of 1949, would be deprived of a valuable privilege if such were denied to them. It would be just and fair to grant a life certificate to those who held on May 1, 1949, state certificates and met the statutory requirements and rules for life certificates.

It is to be noted that Section 75-2504, Revised Codes of Montana, 1947, grants to holders of both elementary and secondary state certificates the right to secure life certificates.

It is, therefore, my opinion that by virtue of Section 7, Chapter 142, Laws of 1949, teachers who held state certificates on May 1, 1949, are entitled to receive life certificates providing they meet the statutory requirements fixed by Section 75-2504, Revised Codes of Montana, 1947, and the rules and regulations of the State Board of Education.

Very truly yours,
ARNOLD H. OLSEN
Attorney General

Opinion 127 - 1950

Held: School District employees with the exception of school teachers are entitled to vacation leave in accordance with the provisions of Chapter 131, Laws of 1949.

September 5th, 1950

Mr. James D. Freebourn
County Attorney
Silver Bow County
Butte, Montana

Dear Mr. Freebourn:

You have requested my opinion whether the employees of a school district are entitled to vacation leave under the provisions of Chapter 131, Laws of 1949.

The sections of Chapter 131, Laws of 1949, which are pertinent to the question you have asked are as follows:

> "Section 1. Each employee of the State, or any County or city thereof, is entitled to and shall be granted annual vacation leave with full pay at the rate of one and one-quarter (1 1/4) working days for each month of service, such service to be computed from the date of employment....
>
> Section 3. An employee, who is separated from the service of the State, or any County, or city thereof, for reason not reflecting discredit on himself, or any employee transferred to or employed in another division or department of the State, or any County or City thereof, shall be entitled upon the date of such separation from transfer to or acceptance of new employment within the State, County, or city thereof, to cash compensation for unused vacation leave...
>
> Section 7. The term 'employee,' as used herein, does not refer to or include elected State, County, or City officials, or school teachers."

Section 1, above quoted refers to employees of the State,

or any County or city thereof. The question to be resolved then is whether or not employees of a school district can be considered as employees of the State or any County or city thereof.

It is at once apparent that a school district is an entity separate and distinct from any County or city and therefore a school district employee could not be considered an employee of either a County or city.

However, the rule in Montana is that a school district is a political subdivision of the State and as such is at all times subject to Legislative regulations and control, except in so far as the Constitution has placed limitations upon the Legislative department. Fitzpatrick v. State Board of Examiners, et al., 105 Mont. 234, 70 Pac. (2nd) 48; State ex rel. City of Missoula v. Holmes, 100 Mont. 256, 47 Pac. (2nd) 624.

Since the school district is a political subdivision of the State it is only reasonable to assume that the Legislature intended that the employees of a school district were included in the category of State employees as provided in the Act. That assumption is strengthened by the language of Section 7 of Chapter 131 wherein the Act specifically excludes school teachers from the operation of the Act. Since the law makers deemed it necessary to specially withhold the benefits of the Act from school teachers, it

follows therefrom that it was their intention that the remaining employees of school districts should be entitled to vacation leave.

It is therefore my opinion that school district employees with the exception of school teachers are entitled to vacation leave in accordance with the provisions of Chapter 131, Laws of 1949.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 129 - 1950

Held: That if an election is not made by affirmative action by a member of the Teachers' Retirement System, who has ten years or more of service, to withdraw his accumulated contribution within six months after termination of service, otherwise than by death or retirement, such member cannot withdraw his contributions. Such member upon reaching retirement age will be entitled to a pension.

October 2, 1950

Mr. R. W. Harper, Executive Secretary
The Teachers' Retirement System
State Capitol
Helena, Montana

Dear Mr. Harper:

You have requested my opinion concerning the status of the account of a teacher with ten or more years of service whose service is discontinued otherwise than by death or retirement and who takes no action in regard to his retention of membership in the retirement system within six months after discontinuance of service.

In considering your question it is necessary to examine Section 4, Chapter 87, Laws of 1937, as amended by Chapter 215, Laws of 1939, Chapter 15, Laws of 1945 and Chapter 28, Laws of 1949, which section reads in part as follows:

> "The membership of any person in the retirement system shall cease:...
>
> (b) If he withdraws his accumulated contributions or retires on a pension or dies, but not otherwise,

> except that the membership of a teacher who has not withdrawn his contributions and who has not had sufficient service to be eligible for disability retirement shall not be cancelled, provided the member shall prove to the satisfaction of the retirement board that absence from service was caused by personal illness constituting disability, or service in the Armed Forces of the United States which includes all members of the Army, the Navy, the Marine Corps, and the Coast Guard, or service in the American Red Cross and Merchant Marine during time of war, and provided any member with ten (10) or more years of service, whose service is discontinued otherwise than by death or retirement, shall have the right to elect within six (6) months after such termination of service, and without right or revocation, whether to allow his accumulated contributions to remain in the retirement fund. Upon the qualification for retirement by reason of age or disability of a member who has elected to allow his accumulated contributions to remain in the retirement fund, he shall receive a retirement allowance in accordance with the provisions of the teachers' retirement act."

The emphasized portion of the above quoted section indicates that those members with ten or more years of service are in a different category than those members with a shorter service record. The reason for the distinction is apparent when subsection 1 (a) of Section 6, Chapter 87, Laws of 1937, as amended by Chapter 137, Laws of 1945, and Chapter 28, Laws of 1949, is considered as it provides:

> "Any member in service who has completed ten years of creditable service, the last ten years of which shall have been in this State, and who has attained the age of Sixty may retire from service, if he files with the Retirement Board his written application setting forth the fact of his retirement."

The result of ten years of service is that the member has satisfied the minimum requirements for a pension. As

expressly stated in the last sentence of Section 4, Chapter 87, Laws of 1937, as amended, and first quoted above, a member of the retirement system who has completed ten years of service and who has left his contributions in the retirement fund shall receive a pension upon qualification for retirement by reason of age or disability.

If a member does not take any affirmative action by either withdrawing his contribution or advising the Board of the retirement system that he will leave his contribution in the retirement fund within the six months period, then it is reasonable to assume that by inaction the member has lost his right to withdraw. An obvious ambiguity is found in the statute under consideration as to such members, but the fact he has acquired a right to a pension by his ten years of service should result in its retention as a matter of law. Analogous situations have occurred in the construction of life insurance policies such as the case of Jeske v. Metropolitan Life Ins. Co., 113 Pa. Super. Ct. 118, 172 A. 172, wherein the Court held that after the death of the insured, "the law will apply the option most advantageous to the insured, or his beneficiary."

See also: McEacheron v. New York Life Ins. Co., 15 Ga. App. 222, 82 S. E. 820, Marti v. Midwest Life Ins. Co., 108 Neb. 345, 189 N.W. 388, 29 A.S.R. 1507.

The fundamental principle found in all retirement systems

is the protection of the participating member during his declining years, and the construction given to the Montana statute under consideration which will further such principle is more beneficial to the members as a whole.

It is therefore my opinion that if an election is not made by affirmative action by a member of the teachers' retirement system, who has ten years or more of service, to withdraw his accumulated contributions within six months after termination of service, otherwise than by death or retirement, such member cannot withdraw his contributions. Such member upon reaching retirement age will be entitled to a pension.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 47 - 1951

Held: A teacher who has three years of prior service and whose contract was not renewed must appeal to the county superintendent of schools and then to the state superintendent of public instruction before resorting to the courts for a preview of the trustees action.

November 13, 1951

Mr. Michael J. O'Connell
County Attorney
Gallatin County
Bozeman, Montana

Dear Mr. O'Connell:

You have requested my opinion concerning the authority and jurisdiction of a county superintendent to hear an appeal by a teacher from the decision of the board of trustees refusing to renew the teacher's contract for the ensuing year. You advise me that the teacher had been employed for more than three years. You also state that the teacher was granted a rehearing by the trustees who refused to change their previous decision.

Section 75-1518, Revised Codes of Montana, 1947, defines the authority of the county superintendent to decide school disputes and hear appeals as follows:

> "He shall decide all matters in controversy arising in his county in the administration of the school law or appealed to him from the decision of school officers or boards. An appeal may be taken from his decision, in which case a full written statement of the facts, together with the testimony and his decision in the case, shall be certified to

> state superintendent for his decision in the matter, which decision shall be final, subject to adjudication or the proper legal remedies in the state courts."

In Kelsey v. School District, 84 Mont. 453, 276 Pac. 26, the court considered the case of a teacher who was dismissed without cause and said:

> "From the action of the board in discharging the plaintiff she had a plain, speedy and adequate remedy--by appeal first to the county superintendent, and having been unsuccessful in that, to the superintendent of public instruction. (Peterson v. School Board, 73 Mont. 442, 236 Pac. 670; Kinzer v. Directors of Independent School Teachers of Marion, 129 Iowa 441, 6 Ann. Cas. 996, 3 L.R.A. (n.x.) 496, 105 N.W. 686.) It is unquestionably the policy of this state, as declared by the legislative assembly, that ordinary school controversies shall be adjusted by those who are specially entrusted with that duty. It is not the policy to encourage resort to the courts in such matters. So long as the school officers act legally and within the power expressly conferred upon them the courts will not interfere. (State ex rel. School District v. Trumper, 69 Mont. 468, 222 Pac. 1064.)"

In the more recent case of Eastman v. School District No. 1, 120 Mont. 63, 180 Pac. (2d) 472, the rule announced in the Kelsey case was quoted with approval and it was stated:

> "The rule is well settled in this jurisdiction that resort may not be had to the courts until adequate remedies by administrative boards have first been exhausted."

An appeal by a teacher who was dismissed for cause before the expiration of a written contract must be taken to the county superintendent of schools under the provisions of

Section 75-2411, Revised Codes of Montana, 1947. This section would not apply to the facts under consideration as it was the refusal to renew her contract which raises the question, and the appeal must be taken under the authority of Section 75-1518, Revised Codes of Montana, 1947. However, the teacher has the right to demand that the reason or reasons for dismissal be stated and a rehearing and reconsideration had, under Section 75-2401, Revised Codes of Montana, 1947, as amended by Chapter 166, Laws of 1949, before taking an appeal.

It is, therefore, my opinion that a teacher who has three years of prior service and whose contract was not renewed must appeal to the county superintendent of schools and then to the state superintendent of public instruction before resorting to the courts for a review of the trustees action.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 51 - 1951

Held: A deputy county superintendent of schools is not required to have the same qualifications as those required by law for the county superintendent of schools.

December 21, 1951

Mr. Robert Hurly
County Attorney
Valley County
Glasgow, Montana

Dear Mr. Hurly:

You have requested my opinion concerning the qualifications of the deputy county superintendent of schools. You ask in particular if the deputy must have the same qualifications as the county superintendent.

Section 75-1502, R. C. M., 1947, defines the qualifications for county superintendents of schools, which are in substance that the superintendent must meet the Constitutional requirements for an office holder, have a teaching certificate, and three years experience. A deputy superintendent of schools may be appointed under the authority of Section 75-1528, but his statute does not fix any specific qualifications for the deputy. However, this has not always been true as in 1947 the legislature in Chapter 194 amended what is now Section 75-1528, by eliminating the requirement that "Such deputy shall hold a Montana certificate not less in value than a professional grade certificate." The fact that the legislature struck from the statute the

requirement that the deputy hold a teaching certificate, is very persuasive that a certificate is not now a qualification for a deputy superintendent of schools. Such a principle was recognized in State ex. rel. Federal Land Bank v. Hays, 86 Mont. 58, 282 Pac. 32, where in the court said:

> "It will be presumed that the legislature, in adopting the amendment, intended to make some change in the existing law, and therefore the court will endeavor to give some effect to the amendment."

There is no express statutory authority requiring all deputies to have the same qualifications as those of the public officer by whom they are appointed. In 43 Am. Jur. 219, the text states:

> "But when the law provides that a ministerial officer may appoint a deputy, for whose acts he and his sureties are responsible, and does not limit or restrict him as to whom he appoints, he has authority to appoint whomsoever he pleases."

As the primary responsibility of the faithful performance of the duties of the office falls upon the county superintendent, it will be to the best interest of the superintendent to appoint a capable person which is a safeguard to the public.

It is therefore my opinion that a deputy county superintendent of schools is not required to have the same qualifications as those required by law for the county superintendent of schools.

Very truly yours,
ARNOLD H. OLSEN
Attorney General

Opinion 9 - 1953

Held: That a board of trustees of a school district which elects to close its school during the annual session of the state teachers' association does not have authority to withhold the pay of its teachers during the days school is closed for such meeting, regardless of the teachers' membership in the association or attendance at its annual session.

March 11th, 1953

Mr. Edward C. Schroeter
County Attorney
Flathead County
Kalispell, Montana

Dear Mr. Schroeter:

You have requested my opinion concerning the authority of the board of trustees of a school district to withhold the pay of a teacher who is not a member of a state teachers' association on the days school is closed for the convention of the association.

There are two statutory provisions which pertain to the closing of schools for conventions of teachers. Subsection 22 of Section 75-1632, R.C.M., 1947, as amended by Chapter 207, Laws of 1951, authorizes school trustees:

> "To close school at their discretion during the annual session of the state teachers' association and to allow teachers to attend the same without loss of salary."

Similar authority is given to the trustees of districts maintaining high schools and trustees of county high schools in

Subsection 12 of Section 75-4231, R. C. M., 1947, as amended by Chapter 106, Laws of 1951, which grants the power:

> "To close the high school at its discretion during the annual session of the state teachers' association and to allow the principal or district superintendent and teachers to attend such annual session without loss of salary."

It is to be observed that the above quoted statutes permit the closing of schools for the meetings of the teachers' association without loss of salary. There is no requirement that the teachers attend the meeting to avoid a deduction in salary, but the trustees are merely given the discretionary power to close the school during the session. The teachers in entering into contracts for their services with the trustees agree to teach school for those days school is open. It is the act of the trustees which closes the schools and prevents the teachers from teaching on the days the schools are closed. The discretionary power granted to the trustees by the statutes is limited to the closing of schools for the convention. The statutes expressly preclude the loss of salary if the schools are closed and there is no discretion given to the trustees to withhold salary payment.

It is not made a duty of the teachers to attend a convention, but the terms of the statute make it possible for the attendance at the convention without salary loss. The intent of the statute is to remove obstacles to attendance, but there is no suggestion of compulsion that would result from

a loss of salary.

An analagous provision is found in Section 75-2202, R. C. M., 1947, which states that"no teacher shall be required to teach school on a legal holiday....and no deduction from the teacher's time or wages shall be made by reason of the fact that a school day happens to be a legal holiday."

It is therefore, my opinion that a board of trustees of a school district which elects to close its school during the annual session of the state teachers' association does not have authority to withhold the pay of its teachers during the days school is closed for such meeting, regardless of the teachers' membership in the association or attendance at its annual session.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 108 - 1954

Held: 1. There may be one or more teachers' associations within this state and the members of one association have equal rights with those members of a similar state-wide teachers' association.

2. Where a school is closed for any teachers' association convention, all teachers in the school are entitled to receive pay for such days.

December 16, 1954

Mr. Irving C. Pearson
County Attorney
Deer Lodge County
Anaconda, Montana

Dear Mr. Pearson:

You have advised me that the trustees of your school district closed the school for one day to permit teachers to attend the annual convention of the Montana Federation of Teachers, and you request my opinion as to whether members of this group have the same rights as members of the Montana Education Association.

In Opinion No. 9, Volume 25, Opinions of the Attorney General, it was held:

> "A board of trustees of a school district which elects to close its school during the annual session of the state teachers' association does not have authority to withhold the pay of its teachers during the days of school the school is closed for such meeting, regardless of the teachers' membership in the association or attendance at its annual session."

While it is true that the Montana Education Association

has been operating and in existence in this state for a greater number of years than the Montana Federation of Teachers, yet both are similar in nature and purpose, and both are state-wide organizations. Sub-section 22 of Section 75-1632, R. C. M., 1947, as amended by Chapter 207, Laws of 1951, grants the power to school trustees:

> "22. To close school at their discretion during the annual session of the state teachers' association, and to allow teachers to attend the same without loss of salary."

This statute does not name any particular association of teachers and if it did, there would be some doubt as to its constitutionality as Section 26 of Article V of the Montana Constitution requires that where a general law can be made applicable, no special law shall be enacted. In State ex rel. Redman vs. Meyers 65 Mont. 124, 210 Pac. 1064, our court said of this constitutional provision:

> "....Interdicted class legislation includes all laws that rest upon some false or deficient classification, and the vice in such laws is that they do not embrace all of the class to which they are naturally related...."

Also sub-section 22 of Section 75-1632, supra, is in general terms and the construction of this law to the effect that some particular teachers' association was intended to be the only organization recognized by this act would violate the express words of the statute.

In Equitable Life Assurance Company vs. Hart, 55, Mont. 76, 173 Pac. 1062, the case stated that: "...a supposed

unexpressed intention cannot override the clear import of the language employed..."

It is therefore, my opinion that there may be one or more teachers' associations within this state and that the members of one association have equal rights with those members of a similar state-wide teachers' association.

It is also my opinion that if school is closed for any teachers' convention, all teachers in the school are entitled to receive pay for such days.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 11 - 1955

Held: 1. The trustees of a school district have the authority to employ any teacher they see fit and have a discretionary power in the employment of a married teacher providing the teacher does not have tenure rights.

2. School trustees do not have the authority to provide in a contract that a teacher must relinquish her position should she marry during the term of the contract.

3. No provisions may be included in teachers' contracts discriminatory to married teachers.

4. School trustees do not have the power to employ married teachers on a day to day basis for the purpose of evading the teachers' tenure law, nor do they have the power to employ single teachers in such a manner.

May 12, 1955

Miss Mary M. Condon
State Superintendent of Public Instruction
State Capitol Building
Helena, Montana

Dear Miss Condon:

You have submitted for my consideration the following questions:

1. May a school board in hiring teachers discriminate against married teachers, all other qualifications being equal?

2. May a school board write a contract between the district and a teacher and include therein a provision that a teacher must relinquish her position should she marry during the term of the contract?

3. May a contract between a teacher and a school board contain any provisions discriminatory to married teachers?

4. May a school board, in order to evade the tenure law, hire married teachers or any other teachers on a day to day basis?

In answering your first question, it is necessary to consider subsection 2 of Section 75-1632, R.C.M., 1947, which grants the power to a board of trustees "to employ or discharge teachers, mechanics, or laborers, and to order paid their wages." This statute gives to the board of trustees the authority to employ any teacher who is qualified to teach; and in the exercise of this power the board may refuse to employ a married teacher, providing the teacher does not have tenure rights. The reason for this conclusion is that the trustees have an absolute discretion to employ initially those teachers who appear to be suitable for a teaching position. Whether the teacher is married might be considered by the trustees in tendering a contract.

Your second question is directed to the power of a board of trustees to include in a teacher's contract a forfeiture provision which will terminate the teacher's rights prior to the expiration of the contract. Section 75-2411, R.C.M., 1947, provides:

> "In the case of the dismissal of any teacher before the expiration of any written contract entered into between such teacher and board of trustees for alleged immorality, unfitness,

> incompetence, or violation of rules, the teacher may appeal to the county superintendent; and if the superintendent decides that the removal was made without cause, the teacher so removed must be reinstated, and shall be entitled to compensation for the time lost during the pending of the appeal."

This statute was held, in Kelsey vs. School District No. 25, 84 Mont. 453, 276 Pac. 26, to be "a condition of the contract as effectively as if expressly written therein." It is obvious that marriage does not make a teacher either unfit or incompetent to teach.

In Richards vs. District School Bd., 78 Or. 621, L.R.A. 1916C, 789, 153 Pac. 482, Ann. Cas. 1917D, 266, a school board attempted to enforce a rule providing that the marriage of a woman teacher automatically terminated her service. The reason advanced for the rule adopted by the board was that after marriage a woman might devote her time and attention to her home, to the neglect of her school work. In discussing the reasonableness of the rule, the court said:

> "...It would be just as reasonable to adopt a rule that if a woman teacher joined a church it would work an automatic dismissal from the schools on an imagined assumption that the church might engross her time, thought and attention, to the detriment of the schools; but such a regulation as the one supposed would not even have the semblance of reason. It must be conceded that quite a different case is presented where the act ruled against is inherently wrong. The Act to which the instant rule relates does not involve a single element of wrong, but, on the contrary, marriage is not only protected by both the written and unwritten law, but it is also fostered by a sound public policy..."

Accordingly, it was held that the rule was unreasonable and that the marriage of a woman teacher was not a ground for dismissal under a statute providing that teachers might be dismissed only for good cause shown. See also: Elwood vs. State ex rel. Griffin, 203 Ind. 626, 180 N.E. 471, and Jameson vs. Board of Education, 74, W. Va. 389, 81 S. E. 1126.

In State ex rel. Saxtorph vs. District Court, ___Mont. 275 Pac. (2d) 209, 11 St. Rep. 460, it was held that the provisions of Section 75-2411, R.C.M., 1947, which provide for the dismissal of a teacher for alleged "immorality, unfitness, incompetence, or violation of rules" states the only grounds for the removal of teachers who have written contracts. In the Richards case cited above, it was held that a rule providing for the termination of a contract, if the teacher married, was not a reasonable rule. Such holding establishes the public policy that marriage is not a ground for dismissal. In Abshire vs. School District No. 1, 124 Mont. 244, 220 Pac. (2d) 1058, it was held that the Teachers' Retirement Act declared the public policy that the compulsory retirement age in Montana is seventy years and the trustees do not have the power to adopt a rule contrary to public policy, it must be concluded in answer to your third question that there may be no discriminatory provisions in contracts with married teachers.

In your fourth question you ask if school trustees in order to evade the tenure law may hire married teachers or

any other teachers on a day to day basis. Subsection 2 of Section 75-1632, R.C.M., 1947, makes it the duty of a school board to enter into written contracts with all teachers. Section 75-2401, R.C.M., 1947, establishes the public policy in this state that a teacher shall acquire tenure rights after having taught for three consecutive years in any school district in the state. In McBride vs. School District No. 2 88 Mont. 110, 290 Pac. 252, it was held that the provisions of the tenure law "became a part of the contract of employment and were binding upon both the teacher and the board of trustees." In Public School District vs. Holson, 31 Ariz. 291, 252 Pac. 509, it was held that the trustees of a school district did not have the power to write into a contract a provision for dismissal at pleasure.

It is therefore my opinion:

1. The trustees of a school district have the authority to employ any teacher they see fit and have a discretionary power in the employment of a married teacher providing the teacher does not have tenure rights.

2. School trustees do not have the authority to provide in a contract that a teacher must relinquish her position should she marry during the term of the contract.

3. No provisions may be included in teachers' contracts discriminatory to married teachers.

4. School trustees do not have the power to employ married teachers on a day to day basis for the purpose of

evading the teachers' tenure law, nor do they have the power to employ single teachers in such a manner.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 15 - 1955

Held: A district superintendent of schools who has served two successive terms in a district may thereafter be appointed to a three-year term by the board of trustees, Section 75-4140, R.C.M., 1947, does not limit succeeding terms to one year.

May 28, 1955

Miss Mary M. Condon
State Superintendent of Public Instruction
State Capitol Building
Helena, Montana

Dear Miss Condon:

You have asked my opinion on the following question:

> "If a District Superintendent of Schools has served two successive terms, may he thereafter be appointed for a three-year term, or are succeeding terms limited to one year by Section 75-4140, R.C.M., 1947?"

The section in question, Section 75-4140, supra, provides:

> "District Superintendent of Schools. The board of trustees of any school district may appoint a superintendent of schools for a term not to exceed three years. After his second successive election, his contract shall thereafter be deemed renewed for a further term of one (1) year, and successively thereafter for like terms of one (1) year each, unless the board of trustees shall by majority vote of its members give written notice to such superintendent on or before the first day of February of the last year of his current term that his services will not be required after the expiration of his existing contract."

Your inquiry primarily is whether the provision for successive one-year renewals is a limitation upon the term for which contracts may be granted by the board of trustees

or only a tenure provision giving the superintendent a right to renewal of his contract.

The present form of Section 74-4140, supra, was enacted by Chapter 66, Laws of 1943. Prior to that time, the statute (originally passed as Section 39, Chapter 148, Laws of 1931,) read as follows:

> "District Superintendent of Schools. The board of trustees of any school district may appoint a superintendent of schools his contract shall thereafter be deemed renewed for a further term of one (1) year, and successively thereafter for like terms of one (1) year, each, unless the board of trustees shall by a majority vote of its members give written notice to such superintendent on or before the 1st day of February of the last year of his current term that his services will not be required after the expiration of his existing contract."

The 1943 Act made two basic changes:

(1) It extended the permissible term for which contracts could be granted by the board of trustees to three years.

(2) It provided that the superintendent's rights to a renewal of his contract should not be effective until he had served two consecutive terms instead of one as had been provided by Chapter 148, Laws of 1931.

In connection with the second point, it should be noted that at the time the 1943 law was passed, the case of State ex rel. Howard vs. Ireland, 114 Mont. 488, 138 Pac. (2d) 569, was before the Supreme Court of Montana. The relator in that action contended, and was upheld in his contention by the Court, that the contract renewal provision of Section

that the contract renewal provision of Section 75-4140, supra granted him tenure and that although it was not specifically so stated in the law, he could not be discharged without formal notice and hearing.

Although the Supreme Court's decision was not handed down until after the legislature had adjourned, it is evident that the law was passed in anticipation of the result. The change in the contract renewal provision was quite plainly designed to withhold the tenure right until the superintendents had completed two terms in the district instead of the previous one term.

In the light of its history, it is evident that the one-year renewal provision was originally enacted and thereafter ontinued by the legislature as a right and privilege of the superintendent and not as a limitation on the term of the contract which could be given him by the board of trustees after his second successive contract had expired.

The first sentence of Section 75-4140, supra, is the only limitation on the contracting power of the board of trustees, and provides that the maximum permissible length of the contract shall be three years. The trustees, if they see fit, may grant a three-year contract to any district superintendent regardless of the number of previous terms he has served in the district.

It is therefore my opinion that a district superintendent

of schools who has served two successive terms in a district may thereafter be appointed to a three-year term by the board of trustees. Section 75-4140, R.C.M., 1947, does not limit succeeding terms to one year.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 26 - 1955

Held: 1. A teacher or principal who has acquired a tenure right by virtue of employment for three consecutive years may be deprived of this right only for legal cause.

2. A school board in taking the right of tenure from a teacher must observe the following provisions of the law:

a. The school board shall, on or before the first day of April, give notice in writing to the teacher that his (or her) services will not be required for the ensuing year;

b. The school board, if requested by the teacher, shall declare clearly and explicitly the specific reason or reasons for the failure to re-employ such teacher;

c. The school board, if requested by the teacher, shall grant a hearing and reconsideration "of such dismissal" to such teacher;

d. The school board must hold such hearing and reconsider its action within ten days after receipt of such request.

3. At the hearing before the board of trustees, evidence must be offered to substantiate the written charges with the right of cross examination on the part of the teacher and the teacher given the right to present evidence to refute the charges.

4. On an appeal to the county superintendent, an additional opportunity of presenting evidence with the right of cross examination is granted to both parties and a written record should be made of all testimony, including a written decision on the part of the county superintendent, which record may be used on an appeal to the State Superintendent of Public Instruction.

July 8, 1955

Mr. E. Gardner Brownlee
County Attorney
Ravalli County
Hamilton, Montana

Dear Mr. Brownlee:

You have requested my opinion concerning the rights of a teacher and the power of the board of trustees in the discharge of a teacher with tenure rights. You also ask how hearings shall be conducted both before the board of trustees and on an appeal to the county superintendent of schools.

The statute which gives to a teacher tenure rights is Section 75-2401, R.C.M., 1947, which reads in part as follows:

> "After the election of any teacher or principal for the third consecutive year in any school district in the state, such teacher or principal so elected shall be deemed re-elected from year to year thereafter at the same salary unless the board of trustees shall by majority vote of its members on or before the first day of April give notice in writing to said teacher or principal that he has been re-elected or that his services will not be required for the ensuing year, but in this written notice, the board of trustees if requested by the teacher or principal, must declare clearly and explicitly the specific reason or reasons for the failure of re-employment of such teacher. The teacher or principal, if he so desires, shall be granted a hearing and re-consideration of such dismissal, before the board of trustees of that school district. The request for a hearing and reconsideration must be made in writing and submitted to the board of school trustees within ten (10) days after receipt of notice of dismissal. The board of trustees must hold a hearing and reconsider its action within ten days after receipt of such request for a hearing and reconsideration.

A recent Montana case, State ex rel. Saxtorph vs. District

Court, Mont. 275 Pac. (2d) 209, 11 St. Rep. 460, considered and interpreted the above-quoted statute and said:

> "In taking the right of tenure from a teacher the law provides that certain steps shall be taken:
>
> (1) The school board shall, on or before the last day of April, give notice in writing to the teacher that his (or her) services will not be required for the ensuing year;
>
> (2) The school board, if requested by the teacher shall declare clearly and explicitly the specific reason or reasons for the failure to re-employ such teacher;
>
> (3) The school board, if requested by the teacher, shall grant a hearing and reconsideration 'of such dismissal' to such teacher;
>
> (4) The school board must hold such hearing and reconsider its action within ten days after receipt of such request."

The court also made the following statement which is pertinent to the questions presented by you:

> "The right of a school teacher to teach in a school, or school district from year to year, after having taught in such school or school district for three consecutive years, is called tenure. A teacher's tenure is a substantial, valuable and beneficial right which cannot be taken away except for good cause."

In State ex rel. Nagle vs. Sullivan, 98 Mont. 425, 40 Pac. (2d 995, our court construed cause for removal of a public officer in the following language:

> "This phrase 'for cause,' as used in this connection, means for reasons which the law and sound public policy recognize as sufficient warrant for removal...that is 'legal cause'...and not merely a cuase which the appointing power, in the exercise of discrection, may deem sufficient..."

It is to be concluded from the foregoing that the board of trustees in dismissing a teacher with tenure has a limited discretionary power and a teacher may be dismissed only for reasons recognised in law.

In the Saxtorph case, the court also said that the failure to re-employ a teacher with tenure constituted a dismissal and, if the teacher had an unexpired written contract at the time notice of dismissal was given, the provisions of Section 75-2411, R.C.M., 1947, apply, which section provides for an appeal to the county superintendent if the teacher has been dismissed "for alleged immorality, unfitness, incompetence or violation of rules."

It is not possible to define "legal cause" so that all grounds for dismissal of a teacher are enumerated. The closing of a school because the enrollment had dropped to to a point that permitted discontinuance under a statute was recognised in Moses vs. School District No. 93, 107 Mont. 300, 86 Pac. (2d) 407, as grounds for terminating a teacher's tenure rights. Similar reasons might well come within the meaning of "legal cause". However, the grounds must be substantial and not the mere whim of the board of trustees.

The grounds expressed in Section 75-2411, R.C.M., 1947, "alleged immorality, unfitness, incompetence or violation of rules" are a legislative expression of the type of personal charges which constitute legal cause for the guidance of school trustees.

The manner of conducting the hearing before the board of trustees for the dismissal of a superintendent of schools was discussed in the case of Howard vs. Ireland, 114 Mont. 486, 138 Pac. (2d) 569. In this case the court expressed the following guiding principles:

> "At a hearing, if such is required, there would need to be charges preferred so that the subject of inquiry be known, and adequate notice to give the accused opportunity to prepare for and attend the meeting to refute the charges made. At such hearing, evidence should be taken; witnesses should be interrogated, with opportunity for cross examination; all to the purpose of determining in a manner judicial the truth or falsity of the charges made..."

As Section 75-2401, R.C.M., 1947, provides that, "... the board of trustees, if requested by the teacher or principal, must declare clearly and explicitly the specific reason or reasons for the failure of re-employment..." , this provision furnishes the written charges against the teacher and the hearing must be held within ten days after receipt of a request for a hearing. The charges made must be substantiated by evidence with the right in the teacher to refute the charges with evidence offered in defense.

The hearing before the county superintendent, which is authorized under Section 75-1518, R.C.M., 1947, is in the nature of a review or an appeal. This was recognized in Howard vs. Ireland, supra. Section 75-1518, supra, authorizes an appeal from the decision of the county superintendent to the State Superintendent of Public Instruction. This statute defines the

record, which is certified to the State Superintendent, as a full written statement of the facts, together with the testimony and the decision of the county superintendent. Therefore it is the duty of the county superintendent to have made a complete stenographic transcript of all testimony and a copy of all papers and exhibits used at the hearing.

The fact that the hearing before the board and the appeals are before an administrative board and administrative officers precludes the application of judicial procedure and rules of evidence. However, the burden of substantiating the charges before the board is on the board, and the burden of proof on appeal is on the appellant. These conclusions are in accord with the general practice of the courts and may be used as guides in the proceedings before school authorities.

It is therefore my opinion:

1. A teacher or principal who has acquired a tenure right by virtue of employment for three consecutive years may be deprived of this right only for legal cause.

2. A school board in taking the right of tenure from a teacher must observe the following provisions of the law:

> a. The school board shall, on or before the 1st day of April, give notice in writing to the teacher that that his (or her) services will not be required for the ensuing year;
>
> b. The school board, if requested by the teacher, shall declare clearly and explicitly the specific reason or reasons for the failure to re-employ such teacher;

c. The school board, if requested by the teacher, shall grant a hearing a reconsideration "of such dismissal" to such teacher;

d. The school board must hold such hearing and reconsider its action within ten days after receipt of such request.

3. At the hearing before the board of trustees, evidence must be offered to substantiate the written charges with the right of cross examination on the part of the teacher and the teacher given the right to present evidence to refute the charges.

4. On an appeal to the county superintendent, an additional opportunity of presenting evidence with the right of cross examination is granted to both parties and a written record should be made of all testimony, including a written decision on the part of the county superintendent, which record may be used on an appeal to the State Superintendent of Public Instruction.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

CHAPTER REFERENCES

The following official opinions of the attorney general can be found in Volume 22 of the Report and Official Opinions of the Attorney General.

Opinion 6 - 1947

The following official opinions of the attorney general can be found in Volume 23 of the Report and Official Opinions of the Attorney General.

Opinion 122 - 1950
Opinion 127 - 1950
Opinion 129 - 1950

The following official opinions of the attorney general can be found in Volume 24 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 47 - 1951
Opinion 51 - 1951

The following official opinions of the attorney general can be found in Volume 25 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 9 - 1953
Opinion 108 - 1954

The following official opinions of the attorney general can be found in Volume 26 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 11 - 1955
Opinion 15 - 1955
Opinion 26 - 1955

CHAPTER VII

BUDGETS AND LEVIES

Opinion 112 - 1946

Held: The ten-mill levy provided for in Section 1203, R.C.M., 1935, as amended by Chapter 51, Laws of 1945, does not relate to high schools and may not be levied for high school purposes.

January 5, 1946

Mr. Thomas Dignan
County Attorney
Valley County
Glasgow, Montana

Dear Mr. Dignan:

You have requested my opinion concerning the application of the ten-mill levy provided for in Section 1203, R.C.M., 1935, as amended by Chapter 51, Laws of 1945, to the budget of the Glasgow high school.

Section 1203, as amended, supra, provides for a "reserve fund for maintaining the elementary and high schools of the district from July first to November thirtieth, of the next succeeding school year." The section also states:

> "The board of county commissioners shall thereupon levy a special tax for such purposes, not exceeding ten mills per dollar on the taxable property of the district..."

This section was construed by this office in Volume 15, page 186, Report and Official Opinions of the Attorney General, wherein it was held that the ten mill levy does not relate to high schools and does not become available to such schools as a source of revenue. I refer you to that opinion for the

reasoning therein contained with which I agree.

A high school is also precluded from such levy by the high school budget act which fixes the limitation on the high school budget and also on the county-wide high school levy. In Volume 20, page 254, Report and Official Opinions of the Attorney General, high school budgets and the levy for high schools were considered by this office. The above cited opinion covers the budgets for the school years 1943-1944 and 1944-1945, and the budgets for the school years 1945-1946 and 1946-1947 will have the advantage of Chapter 133, Laws of 1945, which permits a thirty per cent increase of the limitation on a high school budget and a resulting increase of the special high school tax as provided by Section 1263.11, R.C.M., 1935, as amended.

It is to be noted that Section 1263.5, R.C.M., 1935, as amended fixes the limitations on high school budgets, but these limitations are increased for the years 1943-1944 and 1944-1945 by Chapter 191, Laws of 1943, and for the years 1945-1946 and 1946-1947 by Chapter 133, Laws of 1945. Any increase of a high school budget beyond the above noted limitations must be met by an additional levy for high school purposes after submitting the question at an election as Section 1263.5 as amended, provides in part:

> "...provided further, that nothing herein contained shall be construed as preventing any school district from voting upon itself an additional levy for high school purposes, in accordance with the general school laws pertaining to the voting of additional levies by by school districts."

It is therefore my opinion that the ten-mill levy provided for in Section 1203, R.C.M., 1935, as amended by Chapter 51, Laws of 1945, does not relate to high schools and may not be levied for high school purposes.

Sincerely yours,

R. V. BOTTOMLY,
Attorney General

Opinion 144 - 1946

Held: The reserve fund for maintaining high schools from July 1 to December 1 of each year is to be considered as a part of, and included in the maximum budget as fixed by Section 1263.5, R.C.M., 1935, as amended by Chapter 64, Laws of 1941, and the two-year increase of 30% allowed under Chapter 133, Laws of 1945.

April 25, 1946

Mr. Ernest E. Fenton
County Attorney
Treasure County
Hysham, Montana

Dear Mr. Fenton:

You have requested my opinion on the question of whether or not the amount of the reserve fund for maintaining a high school from July 1 to December 1 must be included in the maximum budget for high schools.

In your letter you point out that if the reserve fund is not included in the maximum amount allowed for high schools under the provisions of Section 1263.5, R.C.M., 1935 as amended by Chapter 64, Laws of 1941, and the emergency increase of thirty per cent permitted by Chapter 133, Laws of 1945, a substantially larger amount of money will be available for the operation of your high school.

Section 1263.2, R.C.M., 1935, sets out the preliminary budget form, and in Part I of the form appears the item

"Cash Reserve Required to Maintain High School from July 1 to December 1 of Following Year." Section 1263.5, R.C.M., 1935, as amended, provides the total amount appropriated in Part I of the preliminary budget shall not exceed the maximum fixed by that section. As the reserve fund is a portion of Part I, it necessarily follows the reserve fund is to be included in fixing the maximum budget for a high school.

You call attention to Section 1203, R.C.M., 1935, as amended by Chapter 51, Laws of 1945, which provides school trustees shall certify the amount needed by the district schools to the county commissioners, and it is specifically stated the amount of money needed as a reserve fund shall be separately certified by the trustees. You suggest this section means the reserve fund is to be included in the final budget and not the preliminary. The purpose of Section 1203, as amended, as I view it, is to assure that a school levy will be made each year by having before the county commissioners certificates of the amounts necessary to be raised by taxation. Such certificates would take the place of the final budget, if the latter were not presented on or before the second Monday in August, the final date for it to be filed with the commissioners. That the final budget is controlling, is recognized by Section 1203, as amended, in that section recites:

"That the budget of any school district, after the

same is finally approved and adopted, shall be deemed and considered to be in lieu of and to take the place of such certificates. Such reserve fund shall not exceed thirty five per centum (35%) of the amount appropriated in the final and approved budget of the district for the then current school years."

It is therefore my opinion the reserve fund for maintaining high schools from July 1 to December 1 of each year is to be considered as a part of, and included in the maximum budget as fixed by Section 1263.5, R.C.M., 1935, as amended by Chapter 64, Laws of 1941, and the two-year increase of thirty per cent allowed under Chapter 133, Laws of 1945.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion No. 171 - 1946

Held: Funds may be transferred from the "new building and alterations" item of a school budget to the interest and sinking fund during the fiscal year.

June 21, 1946

Mr. Fred C. Gabriel
County Attorney
Phillips County
Malta, Montana

Dear Mr. Gabriel:

You have requested my opinion asking if funds may be transferred from a school district building fund to the interest and sinking fund.

In your letter you refer to Sections 1208 to 1210, R.C.M., 1935, which sections provide for a building and furnishing fund and transfer of funds. These sections were enacted prior to the budget law for school districts, and insofar as there is a conflict the budget law would control and work an implied repeal of the earlier sections. Section 1019.3, R.C.M., 1935, sets out the budget form for school districts and provides for "new buildings and alterations (not financed from sale of bonds.)"

Section 1019.17, R.C.M., 1935, provides appropriations shall elapse at the end of the school year. Thus there is no building fund which accumulates from year to year, but only such building fund as is provided in each budget for one

fiscal year. (See Opinion No. 235, Volume 20, Report and Official Opinions of the Attorney General.)

Section 1019.15, R.C.M., 1935, authorizes the transfer of a part of the appropriation from one item to another, but this can be done only during the fiscal year when it appears that there is an excess appropriation for one item and a deficiency in another. (State v. District Court, 95 Mont. 230, 26 Pac. (2d) 345.)

It is well to keep in mind the provisions of Section 3 of Article XIII of the Montana Constitution, which provides

> "All moneys borrowed by or on behalf of the state or any county, city, town, municipality or other subdivision of the state, shall be used only for the purpose specified in the law authorizing the loan."

This provision of our constitution would preclude any transfer being made from the funds realized from the sale of bonds.

It is therefore my opinion, excess funds may be transferred from the "new buildings and alterations" item of a school budget to the interest and sinking fund during the fiscal year.

Sincerely yours,

R. V. BOTTOMLY,
Attorney General

Opinion 177 - 1946

Held: A school district does not have the power to use the proceeds of a bond issue which was issued for the purpose of constructing a workshop to be used in conjunction with the schools of the district in the remodeling of an old swimming pool into a workshop and the construction of a new swimming pool.

July 1, 1946

Mr. Ernest A. Peterson
County Attorney
Gallatin County
Bozeman, Montana

Dear Mr. Peterson:

You have requested my opinion asking if funds realized from the sale of school district bonds issued for the purpose of enlarging a schoolhouse may be used to convert a swimming pool into a workshop and build a new swimming pool in the place of the old. The construction of the workshop was the original purpose of the bond issue. Section 3 of Article XIII of the Montana Constitution provides:

> "All moneys borrowed by or on behalf of the state or any county, city, town municipality or other subdivision of the state, shall be used only for the purpose specified in the law authorizing the loan."

The above quoted would prohibit the use of the money for any other purpose than the construction of the workship. Section 1224.22, R.C.M., 1935, contains the same provisions as the Constitution, and said section reads in part as follows:

> "All moneys arising from the sale of such bonds shall be paid to the county treasurer and by him credited to the school district issuing the same, and shall be immediately available for the purpose for which the bonds were issued and no other purposes."

While the indirect result of the proposed plan would result in the construction of a workshop, yet a portion of the money would be diverted to the construction of a swimming pool, and thus violate both the Constitution and the statutory prohibition against the use of the proceeds of a bond sale for a purpose other than that for which the bonds were issued.

The fact that the contemplated action may be in the best interest of the county or school district is not an admissible argument. The doctrine of expediency does not enter into the construction of statutes. (Franzke v. Fergus County, 76 Mont. 150, 158, 245 Pac, 962.)

It is therefore my opinion that under the constitutional and statutory provisions a school district does not have the power to use the proceeds of a bond issue which was issued for the purpose of constructing a workshop to be used in conjunction with the schools of the district in the remodeling of an old swimming pool into a workshop and the construction of a new swimming pool.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 178 - 1946

Held: The schedule found in Section 7 of Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943, and Chapter 116, Laws of 1945, applies only to the computation of the amount paid to parents or guardians of students who receive such payments instead of bus transportation and the portion of budgets for bus transportation paid by the county and the school districts if fixed by the actual amounts called for in the budgets.

July 5, 1946

Mr. R. McKenna
County Attorney
Fergus County
Lewistown, Montana

Dear Mr. McKenna:

You have requested my opinion asking if the transportation budgets shall be computed according to the schedule fixed by Section 7 Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943, and Chapter 116, Laws of 1945. You advise me that the county commissioners have made levies in accordance with the above schedule and that the amounts so provided have not been sufficient to meet the requirements of the transportation budgets as submitted by the various boards of school trustees within your county.

Under Section 14, Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943, it is made the duty of school trustees to provide complete transportation budgets for both elementary

and high schools.

Each school district and each county high school is reimbursed "in an amount not to exceed one-third (1/3) of the actual cost of transportation from the state public school general fund, under the provisions of Section 13 of Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943. This provision of the law was construed in an opinion of this office, i. e., Opinion No. 120, Volume 21, Report and Official Opinions of the Attorney General, wherein it was held:

> "The State of Montana must pay to the school district one-third the cost of transportation by school buses in accordance with the schedule fixed by the Board of Education as provided in Section 1200.0, R.C.M., 1935, and also the state must pay to the district one-third of the amount paid to parents or guardians in lieu of bus transportation as provided in Section 7 of Chapter 152, Laws of 1941, as amended by Chapter189, Laws of 1943, and Chapter 116, Laws of 1945, and the fact the per capita cost is higher in one class than the other will not change the method of computing the amount of the state's reimbursement to the school district."

From the above quoted it is apparent the contribution by the state for bus transportation is limited and fixed by the schedule promulgated by the State Board of Education. The amount thus paid by the state as reimbursement for bus transportation might well differ from one-third the actual cost because of the use of the schedule referred to.

School districts which furnish transportation for elementary schools are entitled, under Subsection (b) of Section

13, Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943, to reimbursement of one-third of the actual cost of transportation from the common school fund provided by the tax levy made in accordance with the provisions of Section 1202, Revised Codes of Montana, 1935. The levy provided by Section 1202 is a county-wide levy of not more than eight mills and in the event such levy is not sufficient to meet the requirements of the various district budgets, the county commissioners are not authorized to make an additional levy. Opinion No. 243, Volume 20, Report and Official Opinions of the Attorney General.

The foregoing sets out the provisions for two-thirds of the elementary school transportation budgets, and the remaining one-third, and any deficiencies from the State of Montana and the common school fund, are met by the school district under the provisions of Subsection 1, Section 14 of Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943, which allocates the funds realized from a maximum levy of ten mills authorized by Chapter 51, Laws of 1945, to such purposes. If the amount available from such ten mill levy is not sufficient, then, under Subsection 2, Section 14, of Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943, an additional levy against the property of the district may be authorized by the qualified electors of the district.

Both district and county high schools receive reimbursements

from the state for one-third of their transportation budgets as computed according to the previously indicated manner. The balance of high school transportation budget is provided by a county wide tax levy which is not limited in amount as Subsection (b) of Section 14, Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943 reads:

> "...The county commissioners, except as hereinafter provided, shall make a county-wide levy of such number mills as will raise such total."

The schedule found in Section 7 of Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943, has no application to the cost of operating school buses as Section 7 provides in part:

> "The board of trustees may pay to the parents or legally appointed guardian of each child, eligible to transportation under this act, board or rent or provide transportation under for the child, the amount called for under the following schedule <u>in lieu of furnishing bus transportation.</u>"

From the emphasized portion of the above quoted, it is apparent that the schedule found in Section 7 fixes the amounts paid to parents or guardians of students who do not receive transportation on the school buses, but receive such cash payments as a substitute for actual transportation.

It is therefore my opinion that the schedule found in Section 7 of Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943, and Chapter 116, Laws of 1945, applies only to the computation of the amount paid to parents or guardians

of students who receive such payments instead of bus transportation paid by the county and the school districts and the portion of budgets for bus transportation paid by the county and the school districts if fixed by the actual amounts called for in the budgets.

Sincerely yours,

R. V. BUTTOMLY,
Attorney General

Opinion 185 - 1946

Held: The board of trustees of an elementary school district may finance the purchase of a school site, which has been approved by the electorate, by either providing in the school budget for such an appropriation item, or by using the funds realized from the compensation paid for the destruction of the school to be replaced.

July 31, 1946

Mr. Frank J. Roe
County Attorney
Silver Bow County
Butte, Montana

Dear Mr. Roe:

You have requested my opinion concerning the following facts which were thoroughly discussed at a conference in this office on July 29, 1946. There were present at this conference representatives of the budget board and school trustees of School District No. 1, Silver Bow County, the county superintendent, the State Superintendent of Public Instruction and representatives of interested citizen of Silver Bow County. The procedure herein set forth was suggested at this meeting by this office as proper under the pertinent statutes involved, and agreed to by all parties present.

School District No. 1 of Silver Bow County contemplates the purchase of a new elementary school site, the acquisition of which site was approved by the qualified voters at an election. The necessity for acquiring the site arises from the fact that

two schools were destroyed due to the undermining of the schools and shifting of the buildings so that they, together with their lands, must be abandoned. Compensation was paid for the injury to the schools and the money so paid is held as a trust fund. The trustees asked the manner of payment for the new school site.

While negotiations for the purchase of the new school site were entered into prior to June 30th, yet payment could not be made under the school budget in force at the time of such negotiations as there was no appropriation made in the budget for this purpose. (Section 1019.16, R.C.M., 1935.)

An emergency was declared by the board of trustees, but there was not sufficient compliance with Chapter 134, Laws of 1945, which amended Section 1019.16, R.C.M., 1935, to permit such an appropriation.

The new budget which is now being prepared could provide for the purchase of the new school site, which has been approved by the qualified electors. Item II of Section 1 of the school budget which is set out in Section 1019.3, R.C.M., 1935, provides for "new buildings and alterations (not financed from sale of bonds)." This has been construed by this office to be broad enough to include the purchase of additional land for school purposes. (Opinion No. 118, Volume 21, Report and Official Opinions of the Attorney General.) Any surplus available from the previous budget

would be available in the new budget to pay this item and thus not alter the necessary appropriations in the new budget. Another alternative - and perhaps the best - for the payment for the new school site is to utilize a portion of the funds realized from the settlement for damages to the schools that were destroyed. The funds in question are analogous to the moneys realized from insurance on a school which has been destroyed by fire. In the case of State ex rel. Diederichs v. Board of Trustees, 91 Mont. 300, 7 Pac. (2d) 543, the Court said:

> "Here the indebtedness incurred for a county high school building by the issuance of bonds was regularly approved by the people and the indebtedness so incurred is drawing interest. In consequence of the fire, the county is now without benefit. The fire converted the building into money available only for the reconstruction of the high school..
>
> "The fire has resulted in reconverting the building into money. Instead of the building, the county now holds the ruins of the building and the insurance money collected...and in the meantime until the building is reconstructed, the county is put to expense and inconvenience in maintaining its high school."

The money realized from the settlement is trust funds, earmarked for the construction of a school to replace the schools destroyed. The land on which the old schools were located is valueless for the construction of a new school, and in order to build a new school it will be necessary to procure a new site. The use of the trust funds for the purchase of a new site would carry out the purpose of the trust and be in no way a variance from the obligations of the trust.

The Supreme Court of Georgia in the case of Conley v. Rogers, 169 Ga. 65, 149 S.E. 699, considered a similar problem and said:

> "...It is strongly urged by able counsel for the defendants that the sum of $21,000, resulting from the removal and destruction of the school building, can properly be used by the trustees of Reidsville school district in discharging any proper and just obligation of that district. We cannot concur in that argument, but are constrained to hold that the proceeds accruing from the destruction of the building, whether consisting of insurance or any salvage that might have been saved from the building, is by law placed in special trust of the trustees of the school district, for the sole purpose of replacing a school building for that district, either upon the site where the building formerly stood or some other site purchased by the board of trustees as the location of a new school building..."

Under the present budget law it is contemplated that expenditures for the construction of school buildings shall be financed by the issuance of bonds with the result that the tax burden will be spread out over a period of years and not constitute an unreasonable tax burden for any one year. If the purchase of the school site is made from the trust funds and the balance of the moneys necessary for the construction of the schools raised by a bond issue, the tax burden will be distributed over the period of the terms of the bonds. Also such use of the trust funds will permit the funds available in the new budget to be used to better advantage as the cost of maintenance and operation of schools has greatly increased.

The teachers, officers and employees of schools, due to the increased cost of living, are entitled to additional compensation for their services, with the result that school budgets must meet such justifiable demands.

It is therefore my opinion that the board of trustees of an elementary school district may finance the purchase of a school site, which has been approved by the electorate, by either providing in the school budget for such an appropriation item, or by using the funds realized from the compensation paid for the destruction of the school to be replaced.

Sincerely yours,

R. V. BUTTOMLY
Attorney General

Opinion 191 - 1946

Held: Funds for the operation and maintenance of junior colleges may be provided for under Chapter 158, Laws of 1939, by inclusion of the necessary amount in the high school budget/ or by charging tuition for each student, which tuition should not exceed $125.00 per year. Both of these methods may be followed simultaneously in raising the necessary funds.

August 9, 1946

Mr. E. W. Popham
County Attorney
Dawson County
Glendive, Montana

Dear Mr. Popham:

You have requested my opinion concerning the method of providing for the annual expenses of a junior college. Junior colleges may be established under the provisions of Chapter 158, Laws of 1939. Section 9 of Chapter 158 reads as follows:

> "The county high school board or district high school board shall be authorized to include in their budget a sufficient sum to operate and maintain the junior college departments as herein provided, the amount of such budget to be left to their determination. Such boards are also empowered in their discretion, when they shall deem it necessary, to charge tuition at a maximum rate of not exceeding one hundred twenty-five and no/100 ($125.00) dollars per year for attendance at junior colleges established under the terms of this act."

From the above it is apparent that two sources of revenue

are available for the operation and maintenance of the junior college department. First, the board of trustees of the high school may provide in their budget for such expenses and a levy made in the same manner as a levy for high school purposes. The second method is to charge tuition which cannot exceed $125.00 per year for each pupil attending the junior college.

The use of the phrase "the amount of such budget to be left to their determination" indicates that the legislature does not contemplate limiting the necessary funds for the operation and maintenance of the junior college and gave broad discretionary powers to the board in fixing the budget for junior colleges.

It is therefore my opinion that funds for the operation and maintenance of junior colleges may be provided under Chapter 158, Laws of 1939, by inclusion of the necessary amounts in the high school budget and/or by charging tuition, which shall not exceed $125.00 for each student per year. Both of these methods may be followed simultaneously in raising the necessary funds.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 200 - 1946

Held: Outstanding warrants of a school district at the end of a fiscal year which have not been presented for payment, although there are sufficient funds, are paid from the funds of the budget of the prior year and not included in the subsequent budget as an item of expense.

August 28, 1946

Mr. Edison W. Kent
County Attorney
Granite County
Philipsburg, Montana

Dear Mr. Kent:

You have requested my opinion concerning the inclusion in a current elementary school budget of the amount of outstanding warrants issued prior to the end of the last fiscal year. You advise me that there were ample funds to pay the warrants, but the warrants were not paid because they were not presented prior to the end of the fiscal year.

Section 1019.22, R.C.M., 1935, provides the clerk of the district must issue warrants in triplicate and the warrants must show on their faces the appropriation against which they are drawn. One copy is delivered to the county treasurer and the treasurer, on receiving the copy of the warrant, under Section 1019.23, R.C.M., 1935, must enter the amount of such warrant under the proper item of the appropriation so that the unexpended balance will show at all times.

Such procedure results in a partial assignment of the funds as the treasurer who holds the funds has notice the warrant has been issued prior to the presentment of the warrant and allocates the money for the payment of the warrant by his bookkeeping entries.

Under Section 1019.10, R.C. M., 1935, the treasurer shows the cash on hand at the end of the fiscal year, and such information is taken from his records. The surplus or cash on hand would be the unexpended balance from the prior year and would not include outstanding warrants for which money for their payment had been allocated.

Our Supreme Court in State v. State Board of Examiners, 74 Mont. 1, 238 Pac. 316, gave the following definition:

> "However, a warrant is merely 'an order by which one of competent authority authorizes another to pay a particular sum.'"

In 14 Am. Jr. 295, the text states:

> "Under the prevailing rule in equity, an order drawn on a part of a particular fund then due or to become due from the drawee to the drawer will operate as an assignment of the fund pro tanto and will make the drawer equitably answerable to the payee for a failure to comply with the order after notice thereof, irrespective of acceptance."

Applying the above rules, it is apparent the outstanding warrants of which the treasurer has notice and for which deduction has been made, constitute an assignment of the funds, which funds are those of the budget of the prior year.

It is therefore my opinion outstanding warrants of a school district at the end of a fiscal year which have not been presented for payment, although there are sufficient funds, are paid from the funds of the budget of the prior year and not included in the subsequent budget as an item of expense.

Sincerely yours,

R. V. BUTTOMLY,
Attorney General

Opinion 14 - 1947

Held: 1. A board of school budget supervisors has no authority to assign to a county superintendent of schools the power to approve or disapprove transfer of school district budget items.

2. A board of trustees has authority to transfer surplus money in the teachers' salary item to another item in which there is a deficiency.

3. After the adoption of the final budget, expenditures are solely within the authority of the board of school trustees, subject only to the provisions of the budget act, and no authority exists in the board of budget supervisors or the county superintendent to supervise or control expenditures.

March 7, 1947

Mr. James D. Freebourn
County Attorney
Silver Bow County
Butte, Montana

Dear Mr. Freebourn:

You have submitted for my opinion the following questions:

1. Has a board of school budget supervisors the authority to assign to a county superintendent of schools the power to approve or disapprove the transfer of school district budget items?

2. Has a board of trustees the authority to transfer money budgeted for high school teachers' salaries to another

item during the school year?

3. What power or check has a board of school budget supervisors and the county superintendent as clerk of said board over the extravagant or wilful spending of budget items by a board of school trustees before the current school year is completed?

Your first question is answered by Section 1019.15, R.C.M., 1935, as to elementary budgets, and by Section 1263.15, R.C.M., 1935, as to high school budgets. The provisions of these sections are clear and unambiguous. Section 1019.15, R.C.M., 1935, relative to elementary budgets, provides:

> "Whenever it appears to the clerk of any school district that the amount appropriated for any item in the final budget is in excess of the amount actually required to be expended for such item during the year for which such budget was adopted, and that the amount appropriated for any other item in such final budget, and payable from the same fund, is less than the amount which will be actually required for such item during such school year, the clerk of such school district may notify the county treasurer in writing to transfer the excess appropriation, or so much thereof as may be necessary, from one (1) item to the item for which the appropriation is deficient, and the county treasurer must thereof make a transfer of such amount."

Section 1263.15, R.C.M., 1935, as the high school budgets, provides:

"Whenever it appears to the board of trustees of any school district maintaining a high school district, or of a county high school, that the amount appropriated for any item

in the final high school budget is in excess of the amount actually required to be expended for such item during the year for which such budget was adopted, and that the amount appropriated for any other item in such final budget, and payable from the same fund, is less than the amount which will be actually required for such item during such school year, such board of trustees may direct the clerk to notify the county treasurer in writing to transfer the excess appropriation, or so much thereof as may be necessary, from such item to the item for which the appropriation is deficient, and the county treasurer must thereupon make a transfer of such amount. Provided, however, that no transfer shall ever be made by a county treasurer between any appropriation made in a budget for maintaining a high school or high schools and any budget appropriation for maintaining elementary grade schools in the same district."

The only difference in the two sections, as to who shall make the transfer, is that as to elementary budgets the clerk is authorized upon her own initiative to order the transfer, while in the high school budget the board of trustees must order the clerk to notify the treasurer to make the transfer.

It will be noted the only authority to cause a transfer is placed in the clerk or the board of trustees, and upon notice by the clerk to the treasurer, it is made mandatory on the treasurer to make the transfer. There is no provision in

either statute for the approval of such transfer by the board of budget supervisors; such board not having the authority could not authorize anyone else to exercise such authority. Without statutory provision, the budget board or county superintendent would have no such authority.

As to your second question, Section 1263.15, R.C.M., 1935, applicable to high school budgets, is controlling. It authorizes the board of trustees to order the clerk to notify the treasurer to make the transfer. The only restriction is that a transfer may be made only when it appears that there is a surplus or excess in one fund and a deficiency in another, and that no transfers may be made between any items of the elementary budget to those of the high school budget. Therefore, the board of trustees would have the right to transfer from the item of teachers' salaries in the high school budget, when there is a surplus in such item, to any other item in such budget where there is a deficit.

As to your third question, whatever power or check the board of school budget supervisors or the county superintendent as clerk of said board may have over the spending of budget items by a board of school trustees before the current school year is completed, if any, must be found in the provisions of the budget act.

Section 1019.2, R.C.M., 1935, designates the board of county commissioners as the board of school budget supervisors and the county superintendent as clerk of such board. Under Section 1019.13, R.C.M., 1935, th e budget board has authority to make changes or corrections in the elementary budget deemed necessary or proper in any item or amount contained in Sections I, II, or III of any budget, either by eliminating or striking out any item or amount, or by increasing or reducing the amount proposed to be expended for any item, and when it appears to the budget board that any item is in excess of the amount actually required to be expended for such item, the board must reduce such amount to the amount actually required. However, this section then provides as follows:

> "...provided, that the budget board must, before making any such change or correction in the preliminary budget of any district, afford the trustees and clerk of the district an opportunity to be heard thereon, and provided further, that if at any such hearing the trustees of any district and the budget board are unable to agree on the amount to be expended for any such item, the board of trustees by majority vote of all members of the board, may finally fix and determine such amount, and the amount so fixed cannot thereafter be changed by the budget board."

Section 1263.13, R.C.M., 1947, provides that at the meeting of the board of school budget supervisors held on the fourth Monday in July, such board shall have the power "to make any change or corrections it may deem necessary or proper in any item or amount contained in any high school budget, either by eliminating or striking out any item or amount contained therein, or by increasing or reducing the amount

and when it appears to the budget board that the amount proposed to be expended for any item, as shown by a preliminary high school budget, is in excess of the amount actually required to be expended for such item, the board must reduce such amount to the amount actually required to be expended therefor." This section then provides:

> "...provided, however, that in the event the board of budget supervisors shall reject any such budget in whole or in part it shall cause the reasons for its rejection to be spread upon its minutes and a copy thereof to be immediately furnished to the chairman of the board of trustees which has submitted the budget, and provided further, that no final action on said budget shall be taken by the said board of budget supervisors until after a hearing thereon shall have been had, which hearing shall be held by said board of budget supervisors on the first Monday in August after said budgets shall have been submitted. At said hearing the chairman of the board of budget supervisors or a member of that body appointed by him; the chairman of the board of trustees of the district or county high school submitting such budget or a member of the board appointed by him; and the county superintendent of schools shall constitute a board of review. This board of review shall have the power and it shall be its duty to consider such rejected budget and to arrive at a budget by a majority vote which shall not be subject to further review."

It is therefore clear that, as to elementary budgets, the board of trustees has the final say as to the amount to be included in such budget, while in the high school budgets, the board of budget supervisors, subject to review by the board of review, composed of the chairman of the budget board, chairman of the board of trustees of the district submitting

the rejected budget and the county superintendent of schools, has the final say.

However, it must be noted that the above procedure has to do only with the making and adopting of the budgets and not to expending of the amounts finally adopted in the several budgets. The expenditure of the budgetary itemized amounts is exclusively within the power of the board of trustees, subject only to the restrictions of the budget act. Neither the board of budget supervisors, nor the county superintendent as such, or as the clerk of said board, is given any statutory authority to supervise or control expenditures.

It is therefore my opinion:

1. A board of school budget supervisors has no authority to assign to a county superintendent of schools the power to approve or disapprove transfer of school district budget items.

2. A board of trustees has authority to transfer surplus money in the teachers' salary item to another item in which there is a deficiency.

3. After the adoption of the final budget, expenditures are solely within the authority of the board of school trustees, subject only to the provisions of the budget act, and no authority exists in the board of budget supervisors or the county superintendent to supervise or control expenditures

Sincerely yours,
R. V. BUTTOMLY
Attorney General

Opinion 20 - 1947

Held: Chapter 274, laws of 1947, authorizes the maximum budgets for high schools to be increased during the next two fiscal years by fifty per cent of the amount fixed by Section 1263.5, R.C.M., 1935, as amended by Chapter 166, Laws of 1939, and Chapter 64, Laws of 1941, without a special levy approved by the qualified electorate.

Funds in addition to the maximum budget above noted may be granted by the qualified voters at an election submitting the question of such additional levy. In districts maintaining high schools such question would be submitted to the qualified voters of the districts. The additional levy for county high schools, in counties not divided into high school building districts would be submitted to the qualified voters of such building district.

April 2, 1947

Mr. W. W. Lessley
County Attorney
Gallatin County
Bozeman, Montana

Dear Mr. Lessley:

You have requested my opinion as to the effect of Senate Bill 101, which has been designated Chapter 274, Laws of 1947, in regard to high school budgets.

Chapter 274 provides the maximum for high school budgets for the school years 1947-1948 and 1948-1949 may be increased

fifty per cent at the discretion of the trustees and the budget supervisors. By the terms of the act the computation is based on Section 1263.5, R.C.M., 1935, as amended by Chapter 64, Laws of 1941. The trustees in fixing the maximum amount will determine the permissable maximum under Section 1263.5, as amended, and then add an additional fifty per cent. Funds received from the federal government are excluded from the computation of the authorized maximum.

The maximum budget above mentioned is the amount that may be expended by the trustees of a high school without resorting to a special levy authorized by a vote of the qualified electors. Funds realized from a special levy would in fact increase the amount of money available for the operation and maintenance of the high schools during the next fiscal year.

Authority for the extra levy for districts maintaining high schools is found in Section 1263.5, R.C.M., 1935, as amended by Chapter 166, Laws of 1939, and Chapter 64, Laws of 1941, which provides in part:

> "...nothing herein contained shall be construed as preventing any school district from voting upon itself an additional levy for high school purposes, in accordance with the general laws pertaining to the voting of additional levies by school districts."

Previous to Chapter 274 (Senate Bill 101) there had been no provision for an additional levy for county high school to

supplement the maximum budgets authorized by Section 1263.5, as amended. Now, under Section 2 of Chapter 274, if the trustees of a county high school find it necessary and advisable a special levy may be authorized by the qualified electors of the county if such county high school is not in a county divided into high school building districts. The extra levy for county high school building district must be submitted to the qualified electors of such high school building district.

In your inquiry you raised some question concerning the effect of Section 3 of Chapter 274. The purpose of this section is to permit a special levy for high schools to raise the amount necessary for the maximum budgets as fixed by Section 1263.5, as amended, and Section 1 of Chapter 274. Under Section 1263.11, as amended, a special seven mill high school levy is authorized, which seven mill levy may be increased if seven mills will not raise $125.00 per pupil. Section 3 of Chapter 274 is broader than Section 1263.11, as amended, in that there is no limitation of seven mills and such omission is necessary because of the fifty per cent increase in the maximum budgets. Section 3 is not to be construed as permitting any additional increase in funds for high school budgets other than those previously mentioned in this opinion.

It is therefore my opinion:

1. Chapter 274, Laws of 1947, authorizes the maximum budgets for high schools to be increased during the next two fiscal years by fifty per cent of the amount fixed by Section

1263.5, R.C.M., 1935, as amended by Chapter 166, Laws of 1939, and Chapter 64, Laws of 1941, without a special levy approved by the qualified electorate.

2. Funds in addition to the maximum budget above noted may be granted by the qualified voters at an election submitting the question of such additional levy. In districts maintaining high schools such question would be submitted to the qualified voters of the districts. The schools additional levy for county high schools, in counties not divided into high school building districts would be submitted to all of the qualified voters in the county, while the question for the levy for county high schools situated in high school building districts would be submitted to the qualified voters of such building district.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 29 - 1947

Held: 1. Section 1204, R.C.M., 1935, as amended by Chapter 272, Laws of 1947, does not apply to the apportionment of funds realized from Section 1202, R.C.M., 1935, for the school year 1946-1947.

2. Funds apportioned under Section 1204, R.C.M., 1935, as amended by Chapter 272, Laws of 1947, are distributed to the elementary school only, and attendance in the elementary schools serves as the basis for such apportionment.

3. Reimbursement to elementary schools for their transportation budgets is made from the funds realized from the levy provided by Section 1202, R.C.M., 1935, as amended by Chapter 273, Laws of 1947, before the apportionment of such funds under Section 1204, R.C.M., 1935, as amended.

4. The period to be used in computing the "average number belonging" in determining the apportionment of funds for elementary schools under Section 1204, R.C.M., 1935, as amended by Chapter 272, Laws of 1947, is the previous school year.

April 24, 1947

Miss Elizabeth Ireland
State Superintendent of Public Instruction
State Capitol Building
Helena, Montana

Dear Miss Ireland:

You have requested my opinion concerning the Section 1204, R.C.M., 1935, as amended by Chapter 272, Laws of 1947, and have asked the following questions:

1. Does Section 1204, as amended, apply to the apportionment of the common school tax for the last half of the school year 1946-1947?

2. Are the funds apportioned to both elementary schools and high schools under Section 1204, as amended?

3. Does Section 1204, as amended affect the reimbursement to school districts for transportation from the proceeds of the levy authorized by Section 1202, R.C.M., 1935, as amended?

Section 1204, R.C.M., 1935, as amended by Chapter 272, Laws of 1947, provides:

> "All school moneys apportioned by county superintendents of common schools shall be apportioned to the several districts in proportion to the average number belonging. In computing the average number belonging in each school district, the sum of the aggregate attendance and the aggregate days absence shall be divided by the number of days school is in session in the school or schools of the district, provided however, that in computing the aggregate days absence, pupils absent more than three days shall be dropped from the rolls and shall not be considered as belonging."

In answering your first question concerning the application of the amendment to the present school year, it is necessary to consider the results which would follow if it were madeimmediately effective.

The preliminary budget for elementary schools is prepared and adopted in June and the final budget is prepared and adopted in July. Under Section 1019.12, R.C.M., 1935, the tax levies for each school district are fixed not later than the second Monday in

August. The school district budget and all appropriations are based upon the estimated revenue, Section 1019.4, R.C.M., 1935, a portion of which is the funds realized from the levy provided in Section 1202, R.C.M., 1935, as amended by Chapter 273, Laws of 1947. If the method of computing the amount available for each school district were altered during the current school budget the result would be in many school districts that they would be unable to meet their contractual obligations with teachers, bus drivers, and other persons with whom the districts had entered into contracts in anticipation that the method of apportionment of revenue would not be changed.

The Montana Constitution prohibits the impairment of contracts by legislation as Section 11 of Article III provides:

> "No ex post facto law nor law impairing the obligation of contracts, or making any irrevocable grant ofspecial privileges, franchises, or immunities shall be passed by the legislative assembly."

Taking away all or a part of the means of the payment of the school district's contracts would impair the obligation of the contracts. This principle is recognized in 12 Am. Jur. 21, where the text states:

> "When ever the law is so changed that the means of enforcing the duty imposed by the contract are materially impaired the obligation of the contract no longer remains the same. Therefore, a Constitution or a statute impairs the obligation of a contract if it prevents enforcement, or seriously interferes with the enforcement of the contract. While it is undoubted that the legislature may make changes in the remedy, it is necessary that the contract be left with the same force and effect, including the

substantial means of enforcement which existed when it was made."

Your second question is answered by reference to the budget acts for both elementary and high schools, Section 1019.4, R.C.M., 1935, provides a form for the estimate of the revenue for elementary schools. One of the items is the "County Apportionment, six (6) to eight (8) mill levy," which is the levy provided by Section 1202, R.C.M., 1935, Chapter 273, Laws of 1947, has increased the levy to eight to ten mills, but the reference would be the same.

The estimate for high schools found in Section 1263.3, R.C.M., 1935, does not contain any reference to the six to eight mill levy, but does provide for the apportionment of the county high school levy. Section 1263.11, R.C.M., 1935, as amended, provides for a county wide high school levy and this is a special levy for high school purposes which takes the place for high schools of the levy provided in Section 1202, as amended. The statutory method for financing high schools does not contemplate that funds realized from Section 1202, as amended, shall be available for their budgets. Chapter 272, Laws of 1947, which amended Section 1204, R.C.M., 1935, does not alter the disposition of the funds apportioned, but merely changes the method of computation of amount distributed to each district.

Your third question is answered by Opinion No. 180, Volume 20, Report and Official Opinions of the Attorney General, which held that:

> "School districts maintaining elementary schools, or which provide transportation to a school in another district, are entitled to reimbursement from the fund provided by the tax levy authorized by Section 1202, R.C.M., 1935, in the amount of one-third of the actual cost of transportation prior to the apportionment of the fund under the provisions of Section 1204, R.C.M., 1935."

The fact that Section 1202 has been amended by Chapter 273, Laws of 1947, and Section 1204 has been amended by Chapter 272, Laws of 1947, does not alter the application of the above quoted opinion.

Your fourth question concerning the period to be used in the computation of the "average number belonging" must be answered by reference to the practical matters which affect the determination of daily attendance of the pupils.

In State v. Millis, 81 Mont. 86, 261 Pac. 885, our Court said:

> "Statutes are to be construed so as best to effectuate the object of the legislature."

As was observed before in this opinion, budgets are made for school districts in June and July and information concerning the amount of funds from the levy provided in Section 1202, as amended must be available at that time. Therefore, the apportionment by the county superintendent must be based on the records of attendance for the previous school year. If the apportionment were based on the attendance for the current school year, there would be no records available on which to compute the amount distributed.

Section 1078, R.C.M., 1935, makes it the duty of all teachers to file an annual report with the county superintendent on or

before the 10th day of July after the close of the school year. This report would supply the basis for the computation of attendance and is the only adequate report which would meet the need for the determination of the apportionment of the funds for the various elementary districts.

It is, therefore, my opinion:

1. Section 1204, R.C.M., 1935, as amended by Chapter 272, Laws of 1947, does not apply to the apportionment of funds realized from Section 1202, R.C.M., 1935, for the school year 1946-1947.

2. Funds apportioned under Section 1204, R.C.M., 1935, as amended by Chapter 272, Laws of 1947, are distributed to the elementary schools only, and attendance in the elementary schools serves as the basic for such apportionment.

3. Reimbursement to elementary schools for their transportation budgets is made from the funds realized from the levy provided by Section 1202, R.C.M., 1935, as amended by Chapter 273, Laws of 1947, before the apportionment of such funds under Section 1204, R.C.M., 1935, as amended.

4. The period to be used in computing the "average number belonging" in determining the apportionment of funds for elementary schools under Section 1204, R.C.M., 1935, as amended by Chapter 272, Laws of 1947, is the previous school year.

Sincerely yours,
R. V. BOTTOMLY
Attorney General

Opinion 34 - 1947

Held: The board of trustees of a county high school is not authorized to pay insurance premiums in an amount in excess of the amount appropriated for such item unless a transfer of funds may be made in an amount sufficient to pay the premium charge.

May 14, 1947

Mr. W. G. Gilbert, Jr.
County Attorney
Beaverhead County
Dillon, Montana

Dear Mr. Gilbert:

You have requested my opinion as to whether the board of trustees of a county high school may pay insurance premiums for insurance on the county high school buildings in excess of the appropriations for the same contained in the budget.

You advised me that the county commissioners of your county had renegotiated the county insurance policies and the amount of the premiums exceeds the appropriation for insurance in the current budget by $600.00.

Under sub-section 16 of Section 1262.83, R.C.M., 1935, as amended by Chapter 207, Laws of 1939, the board of trustees of a county high school is given the power, and it is its duty to transact all business and to make and execute all contracts in the name of the county. This section gives to the trustees the power to make all insurance contracts.

If we assume that the trustees of the high school should ratify the contract for additional insurance and make the contract that of the board of trustees, the prohibition of Section 1263.14, R.C.M., 1935, must still be considered. This latter section limits expenditures or incurring of liabilities to the amount of detailed appropriations as contained in the budget. However, Section 1263.15, R.C.M., 1935 authorizes excess moneys in one item of the budget to be transferred to an item for which the appropriation is deficient, if these two items are payable from the same fund. This means that transfers may be made to the insurance item from other items contained in Section 6 of part 1 of the high school budget.

The payment of the increase in insurance premiums does not constitute an emergency within the meaning of Section 1019.16, R.C.M., 1935, as amended by Chapter 193, Laws of 1943, and Chapter 134, Laws of 1945, as certain emergencies are enumerated therein, and an increase in insurance rates is not designated as justifying an emergency expenditure.

It is therefore, my opinion that the board of trustees of a county high school is not authorized to pay insurance premiums in an amount in excess of the amount appropriated for such item unless a transfer of funds may be made in an amount sufficient to pay the premium charge.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 42 - 1947

Held: The excess fund in the salaries item of an elementary school budget cannot be transferred to the transportation budget, and any excess in the transportation budget cannot be transferred to any item in the general fund.

June 23, 1947

Mr. Patrick L. Donovan
County Attorney
Toole County
Shelby, Montana

Dear Mr. Donovan:

You have requested my opinion as to whether funds in the salaries item of an elementary budget may be transferred to the transportation budget.

Transfer among appropriations is authorized by Section 1019.15, R.C.M., 1935, which provides:

> "Whenever it appears to the clerk of any school district that the amount appropriated for any item in the final budget is in excess of the amount actually required to be expended for such item during the year for which such budget was adopted, and that the amount appropriated for any other item in such final budget, and payable from the same fund, is less than the amount which will be actually required for such item during such school year, the clerk of such school district may notify the county treasurer in writing to transfer the excess appropriations, or so much thereof as may be necessary, from one (1) item to the item for which the appropriation is deficient, and the county treasurer must thereupon make a transfer of such amount."

It is to be noted that an excess in one appropriation may be transferred to another when they are "payable from

the same fund." Under Section 1019.3, R.C.M., 1935 the item of "salaries" is found in Section 1 designated "general fund expenses."

A budget for transportation is required to be provided under Section 14 of Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943. This section, as amended recognizes the fact that the transportation budget is a seperate budget in that Section 14, as amended, states in part:

> "When a copy of the final elementary budget for any school district is transmitted by the county superintendent of schools to the state superintendent of schools, as required by Section 1019.20, it shall be accompanied by a copy of the transportation budget, if any, adopted for such school district."

While it is true that Section 14 of Chapter 152, Laws of 1941, as amended, requires the amount of the transportation budget to "be shown and included in Section 1" of the budget, yet this does not mean that they are "payable from the same fund." Prior to the enactment of Chapter 152, Laws of 1941, transportation expenses were paid from the "general fund" but by the enactment of Chapter 152, Laws of 1941, a new fund was created to pay transportation charges. Under Chapter 152 and its amendments, additional sources of revenue were made available for transportation which included reimbursements from the state public school fund, Section 13 of Chapter 152, as amended, and an additional levy authorized by sub-section 2 of Section 14, Chapter 152, Laws of 1941, as amended. In other words, the

the transportation fund is made up in an independent manner from the general school fund and thus cannot be considered as the same fund.

If transfers between the general fund and the transportation budget were permitted, the limitations of the budget system would be defeated in that the additional levy authorized for transportation would be utilized for operation and maintenance contrary to the purpose for which the extra levy was granted. Also state funds earmarked for transportation would be diverted to other school purposes.

It is therefore my opinion that the excess funds in the salaries item of an elementary school budget cannot be transferred to the transportation budget, and any excess in the transportation budget cannot be transferred to any item in the general fund.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 45 - 1947

Held: Free Textbooks must be furnished in elementary schools, but there may be no special textbook levy as Section 1199, R.C.M., 1935, was repealed by Chapter 146, Laws of 1931, the elementary school budget act. Section 1198, R.C.M., 1935, was not affected by passage of the budget act. Therefore, the item for free textbooks should be included under item 13 of Section 1 of the budget.

July 12, 1947

Miss Elizabeth Ireland
Superintendent of Public Instruction
State Capitol Building
Helena, Montana

Dear Miss Ireland:

You have requested my opinion as to whether a special levy for textbooks may be made for elementary schools under the provisions of Section 1199, R. C. M., 1935.

Section 1198, R.C.M., 1935, requires all school districts to furnish free textbooks in all schools. Section 1199 authorizes a special tax which will raise an amount not in excess of $3.50 per pupil for free textbooks if the general fund of a school district is insufficient for that purpose. Section 1199 was enacted in 1913 and last amended in 1925. However the budget system for elementary schools was adopted in 1931, and Section 1019.3 includes textbooks as one of the items of the general fund expenses.

Section 1019.14 of the budget act prohibits expenditures in excess of the final amounts fixed in the general fund of the budgets.

The estimated revenues for each school district is made by the county superintendent under the provisions of Section 1019.4 and the enumeration of the sources of revenue does not include a textbook levy. It therefore is to be concluded that the budget act, having been enacted subsequent to Section 1199, the latter act was impliedly repealed and textbooks must be considered as any other item of the general fund.

Also, Section 1019.7 limits the revenue for the general fund to the estimated revenue as shown by the county superintendent's estimate, and any extra levy voted by the qualified electors of the district. This section does not recognize the textbook levy as a possible source of income and by the omission eliminates it as an extra levy. A like conclusion was reached in Opinion No. 199, Volume 20, Report and Official Opinions of the Attorney General in regard to a special levy for textbooks for high schools.

It is, therefore my opinion that free textbooks must be furnished in elementary schools, but there may be no special textbook levy as Section 1199, R.C.M., 1935, was repealed by Chapter 146, Laws of 1931, the elementary school budget act. Section 1198, Revised Codes of Montana, 1935, was not affected by passage of the budget act. Therefore, the item

for free textbooks should be included under item 1) of Section 1 of the budget.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 124 - 1948

Held: Funds realized from the extra levy authorized by Section 2, Chapter 274, Laws of 1947, are for the sole use of the county high school and shall not be apportioned in part to any district high school within the county.

June 30, 1948

Mr. Robert F. Swenberg
County Attorney
Missoula County
Missoula, Montana

Dear Mr. Swenberg:

You have requested my opinion as to whether the funds realized under Section 2, Chapter 274, Laws of 1947, for the operation and maintenance of a county high school shall be apportioned in part to high schools within the county.

The portion of Chapter 274, Laws of 1947, which authorizes an extra levy for county high schools reads as follows:

> "If it shall appear to the satisfaction of the Board of Trustees of any county high school that it is necessary or proper to raise money by taxation in excess of the amount allowed by law, for the purpose of maintaining such county high school...said Board of Trustees of such county high school shall determine and fix the amount necessary...and shall submit the question of an additional levy...to the qualified electors residing in the county where such county high school is situated in case of a county high without a building district, or to the qualified electors residing within such county high school building district..."

The above quoted portion of Chapter 274 authorizes the

additional levy for county high schools and does not mention district high schools and as an extra levy for such high schools is authorized by Section 1263.5, R.C.M., 1935, as amended. The obvious purpose of the legislature in enacting Section 2 of Chapter 274 was to provide additional funds for the operation of "county high schools" as distinguished from "district high schools;" prior to such enactment, there was no method of supplying additional money for "county high schools." There is no requirement that the funds realized for county high school purposes shall be apportioned to district high schools within such county.

In your letter you asked if Section 1263.11, R.C.M., 1935, as amended by Chapter 131, Laws of 1941, would apply in the distribution of the money. Section 1263.11, as amended, provides for a county wide high school levy and prescribes the apportionment of the money to the various high schools in the county. There is no specific requirement in Chapter 274 that the funds realized from the extra levy shall be apportioned to the high schools within the county and to distribute the money in accordance with Section 1263.11 would result in reading into the statute something that is not there. Also, the purpose of Section 2 of Chapter 274 is to supply additional money for operation of county high schools and not for district high schools. The latter may have additional funds as provided in Section 1263.11, as amended.

Another reason for limiting the use of the funds realized under Section 2 of Chapter 274 to county high schools is that this section states that the trustees of such county high schools fix the amount necessary for the maintenance and operation of their school and the additional levy is based on such an amount. To apportion a part of the money to district high schools would result in a deficiency for the county high school. Also, it would not be within the powers of the trustees of the county high school to determine and fix the amount of additional funds for district high schools as they would not come within the jurisdiction of the trustees of the county high school.

It is therefore, my opinion that funds realized from the extra levy authorized by Section 2 of Chapter 274, Laws of 1947, are for the sole use of the county high school and shall not be apportioned in part to any district high school within the county.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 24 - 1949

Held: (1) The cost of maintenance and operation of Junior Colleges must be included in the County or District High School Budget. The maximum mill levy allowed for Junior Colleges is thereby limited and controlled by the maximum mill levy allowed under the High School Budget System.

May 24, 1949

Miss Mary M. Condon
State Superintendent of Public Instruction
Capitol Building
Helena, Montana

Dear Miss Condon:

You have submitted for my opinion the following questions:

(1) What is the legal limit to the number of mills the County Commission may levy for the Junior College without a vote of the people?

(2) Is Chapter 158, Session Laws of 1939, Section 9 the only reference to budgets for Junior Colleges?

The enabling act that provides for the establishment of Junior Colleges is Chapter 158, Session Laws of 1939.

In answering your first question, Section 9, of the above act must be considered and it provides as follows:

> "The County High School Board or District High School Board shall be authorized to include in their budget a sufficient sum to operate and maintain the Junior College departments as herein provided the amount of such budget to be left to their determination. Such Boards are also empowered in their discretion, when they shall deem it necessary, to charge tuitions at a maximum rate of not exceeding

one hundred twenty-five and no/100 ($125.00) dollars per year for attendance at Junior Colleges established under the terms of this act."

It is apparent from the above section that the Legislature intended that the cost of operation and maintenance of Junior College departments be included in the budget of either the County High School Board or District High School Board as the case may be.

The High School Boards, under Chapter 158, Session Laws of 1939, are given wide discretion in providing a sufficient sum for operations and maintenance of Junior Colleges, however this expense must be included in the High School Budget.

Section 1263.5 of the Revised Codes of Montana, 1935, as amended, provides for the preparation and adoption of High School Budgets. The statute also provides for restrictions on the amount of appropriation that will be allowed, depending on the estimated receipts for the general fund of such high school and upon the number of pupils enrolled.

Section 1263.11 of the Revised Codes of Montana, as amended by Chapter 131, Montana Session Laws, 1945, Chapter 274, Montana Session Laws, 1947, and Chapter 199, and Chapter 199, Montana Session Laws, 1949, is also important in this respect as it provides that the County Commissioners may levy an annual special tax for high school purposes, amounting to ten mills on the dollar of the taxable value of all taxable property within the County.

From the above Sections it is evident that the maximum mill levy for High School Budgets in each County or District will vary. As the Junior College Budget must be included in the High School Budget, it follows that the maximum mill levy for Junior Colleges will also vary.

In passing, it should be noted that nothing contained in the above mentioned statutes should be construed as preventing any school district from voting an additional levy for high school purposes or Junior College purposes, in accordance with the general school laws pertaining to the voting of additional levies by school districts.

In answer to your second question, it is my opinion that Chapter 158, Montana Session Laws of 1939, is the only law with reference to budgets for Junior Colleges.

Sincerely yours,

ARNOLD H. OLSEN
Attorney General

Opinion 39 - 1949

Held: Under the provision of Chapter 131, Laws of 1945, as amended by Chapter 161, Laws of 1947, the funds transferred into the deferred maintenance fund cannot be spent for new building construction and equipment, but the expenditure thereof is limited to the maintenance and repair of buildings and the maintenance, repair and replacement of school equipment.

July 22, 1949

Mr. Melvin S. Magnuson
County Attorney
Helena, Montana

Dear Mr. Magnuson:

You have requested my opinion on the following matter:

> "We have been asked whether, under the provisions of Chapter 131, Laws of 1945, as amended by Chapter 161, of Laws of 1947, funds transferred into a deferred maintenance fund can be spent for new building construction during the next fiscal year or whether the expenditure of such funds is limited to the maintenance and repair of buildings and the maintenance, repair and replacement of equipment in such buildings."

Chapter 131, Session Laws of 1945 is entitled:

> "An Act Authorizing the Creation by Boards of School Trustees of Reserve Funds for Elementary Schools, District High Schools, and County High Schools; Providing for the Accumulating of Post War Funds, for Maintenance, Repair and Replacement of School Equipment; Prescribing the Manner in Which Such Funds May be Accumulated; Providing the Time When and the Purposes for Which Such Funds May Be Expended; and the Time During Which This Act Shall Be in Effect."

Section 1 creates a special reserve fund for post-war

"maintenance and repair of buildings and the maintenance, repair and replacement of equipment..."

I call attention to Section 3 of the act which states in part:

> "Beginning with such first day of July the moneys in such reserve funds may be expended for the maintenance, repair, and replacement of school equipment, but for no other purpose..."

Further, Section 4 of the act states that during the life of the act none of the moneys in any such reserve fund may at any time be transferred to any other fund or funds and provides for transfers within fund itself.

The amendment of the act in Chapter 161, Laws of 1947 made no substantial change so far as this opinion is concerned but established the date July 1, 1947 as the date of commencement of expenditure of the reserve fund.

The act itself very definitely limits the expenditure of the reserve fund to specific purposes. Nowhere in that enumeration of purposes does there appear any reference to new buildings construction and equipment. Moreover the Legislature was extremely explicit in its limitation of the expenditure only to those specific purposes enumerated.

Section 4 of Chapter 131, Laws of 1945 states that no transfer to other purpose shall be made during the life of the act and that upon its ceasing to have force and effect any unexpected amounts may be transferred to the general elementary or high school fund by order of the Board of

Trustees.

The act is to remain in effect, according to Chapter 161, Laws of 1947, which amended portions of Chapter 131, Laws of 1945, "for a period of three (3) years after July 1, 1947, but no longer."

In Volume 22, Opinions of the Attorney General, Opinion Number 10, Attorney General Bottomly, in discussing the purpose of an act similar to the one under consideration stated:

> "It was undoubtedly the purpose of the Legislature in enacting Chapter 69, Laws of 1945, to provide post-war funds for the purpose therein set forth, to take up the slack of employment they felt would be in existence upon the termination of the war emergency. I think this is a fair deduction from the reading of the title and the act as a whole."
>
> "Also it was felt repair work and bridge work, and other construction during the war years would be neglected because of the lack of funds and the impossibility of getting materials."

At the end of that opinion, he stated that what he had said in regard to Chapter 69, Laws of 1945, applied also to Chapter 131, Laws of 1945.

Thus it is clear that the fund is not intended to add new capital assets to existing school plants, but to repair and renew those assets which exist and could not be properly maintained or replaced due to the exigencies of emergency, wartime shortages.

It is therefore my opinion that under the provisions of Chapter 131, Laws of 1945, as amended by Chapter 161, Laws of

1947, the funds transferred into the deferred maintenance fund can not be spent for new building construction and equipment, but the expenditure thereof is limited to the "maintenance and repair of buildings and the maintenance, repair and replacement of school equipment."

Very truly yours,

ARNOLD H. OLSEN,
Attorney General

Opinion 76 - 1949

Held: 1. Funds which remain unexpended after the abandonment of a District High School should be transferred to the general fund of the elementary schools of the district.

December 29, 1949

Mr. James F. Walsh
County Attorney
Rosebud County
Forsyth, Montana

Dear Mr. Walsh:

You requested my opinion concerning the disposition of funds which remain after the abandonment of a District High School.

There is no statutory provision made for the disposal of unexpended funds of a District High School which has been abolished. Such is not true in the case of the abolishment of a County High School as Section 1262.26, R.C.M., 1935, (now Section 75-4127, R.C.M., 1947) provides for the distribution of remaining funds of a County High School. Also Section 970, R.C.M., 1935, as amended by Chapter 168, Laws of 1943 (now Section 75-1522, R.C.M., 1947) designated the manner of distribution of funds remaining of an abandoned school district. In the case of State v. Brandenburg, 107 Mont. 199, 82 Pac. (2d) 593, the Court considered the manner of disposal of funds realized from the sale of a building which had been acquired for the use of the County High School. The Court held

that the funds should not be allocated to all of the high schools in the County but must be held by the treasurer for the use of the County High School. The situation of a District High School is analogous in that the capital expenditures made for a District High School result from a tax on the school district. While you did not state the source of the money on hand, yet it is reasonable to assume that much of it came from a tax on the district and as a consequence should be so used as to be of benefit to the district.

It is therefore my opinion that funds which remain after the abandonment of a District High School should be transferred to the general fund of the elementary schools of the district.

Very truly yours,

ARNOLD H. OLSEN,
Attorney General

Opinion 81 - 1950

Held: 1. Any surplus in an elementary school general fund may be used in the next fiscal year to meet the deficiency in the State aid for the foundation program, but such surplus cannot be used to pay the twenty per cent permissive excess over the foundation program.

2. Any surplus in a high school general fund may be used in the next fiscal year to meet the deficiency in the State aid for the foundation program and also the fifteen per cent permissive excess over the foundation program.

January 13, 1950

Miss Mary M. Condon
State Superintendent of Public Instruction
State Capitol
Helena, Montana

Dear Miss Condon:

You have requested my opinion concerning the use of the surplus remaining in the post-war reserve fund for maintenance and repair of buildings in the school districts and also the use of any cash balance in the general fund.

Chapter 131, Laws of 1945, as amended by Chapter 161, Laws of 1947, provided for the accumulation of a reserve fund for repair and equipment of school buildings. Section 5 of Chapter 131, Laws of 1945, as amended by Chapter 161, Laws of 1947, provided that the act would be in effect three years after July 1, 1947, and that any balance on July 1, 1950, must be transferred to the general fund as provided in

Section 4, Chapter 131, Laws of 1945. This will result in many school districts having a cash balance at the end of the fiscal year which raises the question of the use of such money under the provisions of Chapter 199, Laws of 1949.

Section 8 of Chapter 199, Laws of 1949, provides for the distribution of funds to school districts by the State Board of Education in the months of December and April of each year from the State Public School Equalization Fund on the basis of reports made to the State Superintendent of Public Instruction for the maintenance and operation of the schools. The standard for the financing of our schools is the foundation program found in Section 3 of Chapter 199 and the distribution of State aid in Section 8, Chapter 199 is limited to fifty per cent of the foundation program for those districts which qualify for State aid. Section 19 of Chapter 199 makes it the duty of the State Superintendent of Public Instruction to notify each County Superintendent of Schools that there will be a deficiency of the funds for State aid. If the surplus remaining in the reserve fund can be applied to meet the deficiency in State aid, there will be no necessity for an extra levy to supply these funds.

Section 8, Chapter 199 in limiting the maximum aid from the State to fifty per cent also recognizes the foundation program as the standard and the phrase "from all other sources" justifies the utilization of the surplus to maintain

the standard and thus meet the State deficiency. This would apply with equal force to any surplus in the general fund, whatever the source, with the exception of the reserves as provided for in Sections 10 and 14 of Chapter 199.

The application of the general fund surplus to meet the permissive additional expenses of twenty per cent for elementary schools, Section 9 of Chapter 199, and fifteen per cent for high schools, Section 14, Chapter 199, raises additional questions. The elementary schools would be precluded from the use of the surplus to meet the additional expense as Section 9 of Chapter 199 contains this limitation:

> "...but the entire amount of such excess expense over the foundation program shall be paid solely from levies upon the property in such district..."

However, there is not such a prohibition as to high school budgets as Section 14, Chapter 199 states:

> "...but the allowance of such excess expense over the foundation program shall not in any manner increase the amounts to be apportioned hereunder from the State Public School Equalization fund..."

It is reasonable to assume that the Legislature in making the distinction between the elementary and high school budgets recognized that the surplus in the high school general fund could be used to meet the excess expense over the foundation program.

It is therefore my opinion:

1. Any surplus in an elementary school general fund may

be used in the next fiscal year to meet the deficiency in the State aid for the foundation program, but such surplus cannot be used to pay the twenty per cent permissive excess over the foundation program.

2. Any surplus in a high school general fund may be used in the next fiscal year to meet the deficiency in the state aid for the foundation program and also the fifteen per cent permissive excess over the foundation program.

Very truly yours,

ARNOLD H. OLSEN,
Attorney General

Opinion 86 - 1950

Held: Any surplus remaining that is in the reserve fund for post-war maintenance, repair and equipment created by Sections 75-3710 through 75-3714, R.C.M., 1947, MUST be transferred to school general fund after July 1, 1950.

January 31, 1950

Miss Mary M. Condon
State Superintendent of Public Instruction
State Capitol
Helena, Montana

Dear Miss Condon:

You have asked if it is mandatory that the balance remaining in the post-war reserve fund for maintenance and repair of buildings of school districts be transferred to the general fund of the school districts of this State.

Chapter 131, Session Laws of 1945, as amended by Chapter 161, Session Laws of 1947, as now contained in Sections 75-3710 through 75-3714, R.C.M., 1947, created and defined the use of the reserve fund. Section 75-3713, supra, is as follows in part:

> "...and provided further that immediately following the date when this act shall cease to be of any force or effect, if there shall remain in any such reserve fund any amount unexpended and unappropriated such amount may, by order of the Board of Trustees be transferred to the general elementary school fund.. or to the district high school fund...or to the County high school fund..."

The date of the termination of the act is fixed at July 1,

1950, as Section 75-3714, supra, reads as follows:

> "This act shall be in full force and effect from and after its passage and approval and shall remain in effect for a period of three (3) years after July 1, 1947, but no longer."

As the reserve fund is dependent for its existence on the life of Chapter 131, Session Laws of 1945, as amended, the expiration of the act would preclude any expenditure from the reserve fund. The reserve fund as such would lapse and not be continued as an item in the budget for the next fiscal year.

Section 75-1714, R.C.M., 1947, formerly Section 1019.14 R.C.M., 1935, which is a part of the elementary school budget act, limits expenditures to the detailed appropriations fixed by the budget. A like provision is found in the high school budget act. It is a reasonable conclusion that as the authority for the deferred maintenance reserve fund has been taken away, the provisions of the budget law, referred to above, will control.

The Supreme Court of Montana has made numerous rulings upon the question of whether the word "may" in a statute can be interpreted as "shall" or "must" and the general rule is now well established that such interpretation is to be made when it is determined that the Legislature intended the word to be used in a mandatory sense. Durland v. Prickett, 98, Mont. 399, 39 Pac. (2d) 652; State ex rel. McCabe v. District

Court, 106 Mont. 272, 76 Pac. (2d) 634; Hansen v. City of Havre, 112 Mont. 207, 114 Pac. (2d) 1053, 135 A.L.R. 1278. In the Hansen case the court held as follows on page 217 of the Montana Reports:

> "Defendants contend that the word "may" as used in Section 5277.3 means "must" or "shall". We think this contention must be sustained. We have often held that "may" means "must" or "shall", depending upon the apparent Legislative intent. (Citing Cases)."

Since any balance remaining in the post-war reserve fund could not be expended after the expiration of the act unless such balance was transferred to one of the enumerated school funds, the provisions of Section 75-3713, supra, that any amount unexpended and unappropriated "may" be transferred must be interpreted to mean "must" be transferred. It cannot be said that it was the intent of the Legislature to permit such funds to lie idle after the act creating the post-war reserve fund has expired.

It is therefore my opinion that any surplus remaining in the reserve fund for post-war maintenance, repair and equipment created by Sections 75-3710 through 75-3714, R.C.M., 1947, MUST be transferred to the school general fund after July 1, 1950.

Very truly yours,

ARNOLD H. OLSEN,
Attorney General

Opinion No. 29 - 1951

Held: Levies on high school districts and the county wide levies for the maintenance of high schools are valid and legal levies.

July 30, 1951

Mr. Norman R. Barncord
County Attorney
Wheatland County
Harlowton, Montana

Dear Mr. Barncord:

You have requested my opinion concerning the levy on high school building districts and the county wide levy for the maintenance and operation of high schools. Your questions are asked because of the recent opinion of our Supreme Court in the case of Rankin vs. Love, et al., 5 State Reporter 316, Pac. (2d), which was decided June 14th, 1951.

The facts which were the basis for the litigation in Rankin vs. Love arose from an attempt of a high school district to issue bonds. The bounderies of the high school district and the elementery district were identical and the court directed its attention primarily to the limitation of indebtedness for school purposes and stated:

> "Contravening section 6 of Article XIII as it does, Chapter 275, Laws of 1947 (R.C.M., 1947, 75-4601 75-4606), is unconstitutional and is invalid."

This quoted portion of the opinion illustrates that the court's concern was with the problem of school indebtedness and this is more apparent in that the decision expressly

overruled House vs. School District No. 4 of Park County, 120 Mont. 319, 184 Pac. (2d) 285, which held that a common school district could incur indebtedness up to the constitutional limit without regard to the indebtedness of the high school district in which it was located. Our court by such action precluded one piece of property with being burdened up to the limit of indebtedness of the elementary district and then up to the same limit by the overlapping high school district.

In the case of Rankin vs. Love the history of school districts and in particular the legislation relating to high schools was reviewed and the court said:

> "In accordance therewith, a high school, when established, becomes an integral part of the public school system in that particular district. It is under the jurisdiction of the same board of trustees as the elementary grades or any other department of the public school system existing in that particular "school district," and financed and maintained by taxation on the property lying and being within the exterior boundaries of that particular school district. This was the law of this state prior to and at the time of the writing of our Constitution in regard to public schools and "school districts," and it is still the law of this jurisdiction."

In making this statement the case of Pierson vs. Hendricksen, 98 Mont. 244, 38 Pac. (2d) 991, which approved high school districts, was not limited or reversed, although it was before the Court. The Pierson case considered the first high school district law which is almost identical with the present laws, and said:

> "The state legislature may create or abolish districts, or change or re-arrange boundaries at will. (State ex rel. Redman vs. Meyers, 65 Mont. 124, 210 Pac. 1064.) It has then by Chapter 47 done so with the view of eliminating some of the inequalities pointed out in the Henderson case, and with the view of having the bonds paid by those who obtain the most use of the property benefited by the improvement. We see no constitutional objection to the plan as provided in Chapter 47."

While it is true that high school building districts were created for the purpose of issuing bonds for construction, repair, improvement and equipment of school buildings, Section 75-4605 R.C.M., 1947, yet the legislature had the constitutional authority to utilize the high school districts for maintenance and operation as was done in Chapter 199, Laws of 1949. Section 1 of Article XI of the Montana Constitution directs the Legislature to provide a school system by the provision:

> "It shall be the duty of the legislative assembly of Montana to establish and maintain a general, uniform and thorough system of public, free, common schools."

This constitutional provision was considered in Evers vs. Hudson, 36 Mont. 135, 92 Pac. 462, wherein the court approved a legislative act that authorized the establishment of county high schools. The Court's observations concerning this section of the constitution are pertinent:

> "The evident purpose of section 1, Article XI, above, was to insure a system of common schools; but there is not anything in that section, or elsewhere in the Constitution, which directly

> limits, or by implication may be said to limit, the power of the legislature to provide for other schools. As to whether there is any limitation, beyond which the law-making power may not go in matters of this character, need not now be considered. It was said in Koester vs. Board of County Commissioners, 44 Kan. 141, 24 Pac. 65: 'The concern of the Constitution makers does not seem to have been to provide against the danger of too many schools, but to secure a common school system principally, and also other schools of a higher grade.'"
>
> "Section 1, Article XI, is not a limitation upon the legislative power, but is a solemn mandate to the legislature. That the chief concern of the framers of the Constitution was directed to free common schools is evidenced by the facts that such schools are made sole beneficiaries of the public school funds. But the declared concern of the Constitution framers for a system of public free common schools does not in any sense militate against the power of the legislature to establish other schools. "The matter of education is one of public interest, which concerns all the people of the state, and is therefore subject to the control of the legislature."

Thus, approval was granted by our court to an act which authorized the establishment of county high schools. County high schools have never been a part of any school district and their bonds are those of the county in which they are located. The language used in State ex rel. Henderson vs. Dawson County, 87 Mont. 122, 286 Pac. 125, is of specific application as the court said:

> "However, a high school education is a necessary intermediate step between the ordinary grade schools and the university courses provided for, and the term "common" as applied to our schools "bears the broadest and most comprehensive signification, it being equivalent to public, universal, open to all." It is used in contradistinction

> to private and denominational schools, colleges and the like, but has no reference to the grade of school or what may be taught therein, nor the method of rule or government thereof. ********** Thus, under constitutional authority, the legislature may either leave the matter of high school education to the several school districts of a county or provide a different method of rule or government for this class of "common schools." For years the first method was followed; such high school education as was afforded was given in district school courses or high schools established in districts, without legislative sanction.
>
> "In 1899 the legislative body provided for the establishment of free county high schools by a vote of the electors of the county, and for which trustees were to be appointed by the board of county commissioners; these trustees were empowered to "bond the county" for the purpose of building and equipping a county high school building."

The conclusion to be reached from the legislative provision for, and the judicial recognition of county high schools and their method of financing is that common school districts are not the exclusive means of school financing. In fact the Court in Rankin vs. Love was not faced with the question of levies for maintenance and operation, and such problems were outside of the scope of the decision. It is most important to remember that the real question decided by the court was the limitation of indebtedness as evidenced by the fact House vs. School District No. 4 of Park County 120 Mont. 319, 184 Pac. (2d) 285, was expressly overruled.

Two of the fundamental sources of income for the schools of our state are the county wide levy for common schools, Section 75-3706, R.C.M., 1947, and the county wide high school

levy, Section 15, Chapter 208, Laws of 1951, If the school district is the exclusive "taxing unit" for the support of both elementary and high schools then the county wide levies of both elementary end high schools then the county wide levies would be unconstitutional. This cannot be the intent of the court and it would not be reasonable to read into the case of Rankin vs. Love problems which were not before the Court for consideration and concerning which the Court has ruled as set foth above. Historically the county wide levy for the support of the common schools antedated the Montana Constitutional Convention of 1889 as Section 44 of the Laws of 1871 provided for such a levy and the statute was operative in 1889.

Section 1 of Article XI of the Montana Constitution as construed in Evers vs. Hudson, supra, gives legal sanction to the legislative creation of high school districts and the fact the decision did not overrule Pierson vs. Hendricksen, 98 Mont. 244, 38 Pac. (2d) 991, and Berthot vs. Gallatin County High School District, 102 Mont. 356, 58 Pac. (2d) 264, permits the conclusion that high school districts are legal entities for school purposes.

It is therefore my opinion that levies on high school districts and the county wide levies for the maintenance of high schools are valid and legal levies.

Very truly yours,
ARNOLD H. OLSEN
Attorney General

Opinion 33 - 1951

Held: Any deficiency in state aid for the elementary budget in a joint school is the obligation of the entire area of the joint district and a levy must be made on such area to meet the need.

August 15, 1951

Mr. J. E. McKenna
County Attorney
Fergus County
Lewistown, Montana

Dear Mr. McKenna:

You have requested my opinion concerning the levy to be made on a joint school district to meet the deficiency in state aid on the foundation program for the elementary budget. You advise me that Judith Basin County, in which part of the joint district is located, meets the standard of the foundation program without state aid. You also advise me that Fergus County, in which part of the joint district is situated, requires state aid in order to achieve the foundation program. As there is a 10 per cent deficiency in state aid, you would like to know what area of the joint district is subject to a levy to supply the funds for the deficiency.

Section 17 of Chapter 199, Laws of 1949, as amended by Section 1 of Chapter 182, Laws of 1951, contains specific directions for the computation of the elementary budgets in joint school districts. This statute reads in part as follows:

"The balance of the budget over the foundation

> program, plus any deficiency in the state equalization payment on the foundation program, shall be an obligation of all parts of the joint district and the levy for this amount shall be determined by dividing the amount required by the total taxable valuation of the entire joint school district."

From the above quoted portion of Chapter 182, Laws of 1951, it is apparent that any deficiency in state aid must be met by a levy on the whole area of the joint school district. This results in an inequality to that portion of a joint district which is located in a county which does not require state aid because the five mill district levy and the apportionment of the ten mill county levy are sufficient to meet the foundation program budget requirements. However, the legislature by this statute, has fixed the means of meeting the standard of the foundation program and we are bound by this law.

It is therefore my opinion that any deficiency in state aid for the elementary budget in a joint school is the obligation of the entire area of the joint district and a levy must be made on such area to meet the need.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 46 - 1951

Held: The funds received by the school districts from the Federal Government under Public Law 874, 81st Congress, shall not be used by the school districts in addition to the appropriations found in the budgets of the school districts, but shall be used to relieve the tax burdens due to the increased enrollment resulting from federal installations in the districts.

November 7, 1951

Mr. Ted James
County Attorney
Cascade County
Great Falls, Montana

Dear Mr. James:

You have requested my opinion concerning the use of federal funds received by school district #1 of your county from the federal government by virtue of Public Law 874. You advise me that there has been a material increase in school enrollment due to new federal agencies established in your city. The sum of $34,451.51 was received from the federal government after June 30, 1951, as assistance to the school district. Your specific question is directed to the proper use of this money under our school budget law.

Public Law 874, 81st Congress, reads in part as follows:

> "Section 1. In recognition of the responsibility of the United States for the impact which certain federal activities have on the local educational agencies in the areas in which such activities

> are carried on, the congress hereby declares it to be the policy of the United States to provide financial assistance (as set forth in the following sections of this act) for those local educational agencies upon which the United States has placed financial burdens by reason of the fact that--
>
> (1) the revenues available to such agencies from local sources have been reduced as the result of the acquisition of real property by the United States; or
>
> (2) such agencies provide education for children residing on federal property; or
>
> (3) such agencies provide education for children whose parents are employed on federal property; or
>
> (4) there has been a sudden and substantial increase in school attendance as the result of federal activities."

The obvious purpose of the congressional act is to relieve in part the taxpayers in your locality from the increased burden on your schools.

While the federal money was granted to the school district to relieve the tax load, yet the congressional act did not alter the operation of our budget laws or school finance statutes.

From the correspondence submitted with your letter, it appears that the federal money was not included in income for the current school budget, as the funds were received subsequent to the computation of the budget. It is the proposal of the school board to use the money under an additional federal funds budget.

The basis of our school finance system is a per capita distribution of district, county and state funds for the support of the schools allocated on the basis of "the average number belonging" or the attendance for the previous school

year. Sections 1 and 2, Chapter 199, Laws of 1949. This act Chapter 199, Laws of 1949, established a "foundation program" for our schools which is not only a minimum standard but also a maximum standard with certain permissive increases authorized. That the total amount of the general fund expenses shall not exceed the foundation program, with permissive increases and voted levies, is provided in Section 9 and 14 of Chapter 199, Laws of 1949, as amended by Chapter 208, Laws of 1951.

The items in the budgets which are to be expended during the year constitute appropriations and the trustees cannot under Sections 75-1714 and 75-4519, R.C.M., 1947, exceed the total of these items. If additional expenses are incurred they are not liabilities of the district.

It appears that the trustees of the school district in your county attempted to set up an independent budget for the expenditure of the funds received from the federal government, although there is not statutory authority for such procedure. As was previously pointed out, the sum of money received was a reimbursement for the additional expense to the district. If an additional budget to spend the money is created and the foundation program is exceeded, then there will be no relief to the taxpayers and the purpose of the grant will thus be defeated.

It is true that an independent transportation budget is adopted each year, but his is done by virtue of Section 75-3414,

Revised Codes of Montana, 1947 which specifically states that such a budget shall be provided. Similar budgets are used for vocational training, and school lunch program, but these activities are under the general school laws, as is apparent from a reading of Sections 75-4245 and 75-4802, R.C.M, 1947.

As you stated in your letter the funds in question were not received until after June 30, 1951, the end of the fiscal year for the schools and did not constitute "cash on hand" at that time. However it is the lack of appropriations in the budget which constitutes the real barrier to the expenditures of this money, as was pointed out above. If there has been an increase in enrollment so as to constitute an emergency within the meaning of the definition found in Section 75-1716 and 75-4521, R.C.M., 1947, then emergency budgets may be adopted and the cash on hand may be used to pay the appropriations of such budgets. If emergency budgets are not adopted, the funds will be available for us in the following fiscal year.

As these federal funds are to be used to relieve the local taxpayers from the increased load, the money should be allocated to all of the funds in the budget, including the independent, budgets which are supported by levies on the property in the district, in the proportionate amount each bears to the whole.

It is therefore, my opinion that the funds received by the school districts from the Federal Government under Public Law 874, 81st Congress, shall not be used by the school

districts in addition to the appropriations found in the budgets of the school districts, but shall be used to relieve the tax burden due to the increased enrollment resulting from federal installations in the districts.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 73 - 1952

Held: The failure to levy the full ten mill county wide levy for the high schools of a county, due to a clerical error, cannot be corrected by a levy in excess of ten mills on all the property in the county in the next fiscal year.

March 29, 1952

Mr. John Michael McCarvel
County Attorney
Deer Lodge County
Anaconda, Montana

Dear Mr. McCarvel:

You have requested my opinion concerning an error made in the high school levy in your county. You advise me that the high school budget provided for a ten mill county wide levy, but a clerical error was made and the actual levy made by the county commissioners was a four mill levy. You ask if a sixteen mill county wide levy may be made for the next fiscal year.

Section 15, Chapter 199, Laws of 1949, as amended by Chapter 208, Laws of 1951, provides for an annual county wide levy of ten mills for the support of the high schools of the county. This section limits the county wide levy to the fiscal year for which the levy is made. Also, the foundation program for the current year is a limitation for the levy. To permit the levy for one year to be increased above the authorized amount for the purpose of realizing funds to restore moneys due to an erroneous levy for a previous year

is not within the contemplation of the statute. The applicable rule is found in 51 Am. Jr. 621, where it is said:

> "It is essential to the validity of a tax that it be of no greater amount than was authorized by the legislature, and any excess over the amount so authorized will render the assessment void, however, trivial the excess may be."
> See: State ex rel. Tillman v. District Court, 101 Mont. 176, 53 P. (2d) 107, 103 A.L.R. 376

During this current fiscal year there are sufficient appropriations in the budget to meet the needs of the high school, but there are not funds to meet the appropriations. The only solution is to register warrants as permitted by Section 16-2604, R.C.M., 1947, as Section 75-4532, R.C.M., 1947, limits the payment or registration of warrants to the amount of the appropriation. The registered warrants will be an item for payment in the budget for the following year.

Because of this additional expense, it may be necessary to vote an extra levy on the school district for the budget for the next fiscal year.

It is therefore my opinion that the failure to levy the full ten mill county wide levy for the high schools of a county, due to a clerical error, cannot be corrected by a levy in excess of ten mills on all the property in the county in the next fiscal year.

Very truly yours,
ARNOLD H. OLSEN
Attorney General

Opinion 101 - 1952

Held: Kindergarten pupils, in an established kindergarten upon reaching the age of six years, may be included in the A.N.B. of the school districts and their daily attendance considered in determining the amount of state financial aid for the schools of their district.

July 8, 1952

Miss Mary M. Condon
State Superintendent of Public Instruction
State Capitol
Helena, Montana

Dear Miss Condon:

You have requested my opinion as to whether or not kindergarten pupils, upon reaching the age of six years, may be included in the A.N.B. of the schools involved in determining the foundation program.

> Section 7 Article I of the Montana Constitution provides, "The public free schools of the state shall be open to all children and youth between the ages of six and twenty-one years."

From this constitutional provision it is apparent that any child who reaches his sixth birthday is entitled to attend school as a matter of right and should be considered in determining the number of enrolled pupils. The fact that the child is in kindergarten would not preclude him from being considered as a student in the public schools for the reason that Section 75-2001 defines a public school so that it includes an established kindergarten in the following language:

> "A public school is a school established and maintained under the laws of this state at public expense and comprising the elementary grades, and, when established, the kindergarten and the high school including all the junior and senior grades of high school work."

The distribution of state aid to the public schools is made under the provisions of Chapter 199, Laws of 1949, as amended, and the basis of such distribution is fixed by the "average number belonging" or "A.N.B." which is defined as meaning "the average number of regularly enrolled full time pupils attending a public school."

Kindergarten pupils in an established kindergarten who have reached the age of six years meet all the qualifications of the above statutes and their attendance may be counted in the computation for the state aid.

It is therefore, my opinion that kindergarten pupils, in an established kindergarten upon reaching the age of six years, may be included in the A.N.B. of the school districts and their daily attendance considered in determining the amount of state financial aid for the schools of their district.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 92 - 1954

Held: 1. In the submission of the question to the qualified electors of a high school district whether an extra levy should be authorized the amounts needed for each high school must be incorporated in one question.

2. An extra levy may be voted by the electorate of a school district for the use of the high school of the district although the school district is a part of a high school district.

August 26, 1954

Mr. W. M. Black
County Attorney
Toole County
Shelby, Montana

Dear Mr. Black:

You have requested my opinion concerning the validity of two special elections for extra levies. You advise me that there are two high schools in one high school district. You also state that separate ballots were used at the election submitting propositions for extra levies for the support and maintenance of each of the two high schools. The electors approved the extra levy for one of the high schools and rejected the levy on the high school district for the other high school. Subsequently, a special election was held in the common school district and a special levy was approved for the support and maintenance of the high school whose request for an extra levy on the high school district had

been rejected.

In considering the problem, it is necessary to observe the provisions of two pertinent code sections. Section 75-3801, R.C.M., 1947, as last amended by Chapter 247, Laws of 1953, reads in part as follows:

> "(2) Whenever the board of trustees of any district or county high school shall deem it necessary to raise money by taxation in excess of the levy required to meet its foundation program..... for the purpose of maintaining the high schools of said district or the county high school,...or for any other purpose necessary for the proper operation and maintenance of the schools of said district, or county high school, said board of trustees shall determine and fix the amount necessary and required for such purpose or purposes in addition to any other legal levies on the district,...and in the case of the district high school it shall submit the question of an additional levy to raise said amount to the qualified electors residing within the district who are taxpayers and whose names appear upon the last completed assessment roll of the county for state, county and school taxes, either at the regular annual election held in said district or at a special election called for that purpose by the board of trustees of said district."

The above quoted authorizes an election on the question of an additional levy for the support of a district high school to the voters of the district in which the high school is situated. Section 75-4609, R.C.M., 1947, as last amended by Chapter 120, Laws of 1953, provides:

> "Special tax Levy - - Election. Whenever the board of trustees of the local school district within which the high school is situated shall deem it necessary to raise money for high school purposes in addition to its revenues from county and state apportionments, a meeting of the board

> of trustees of the high school district together with the chairmen of the boards of trustees of all common school districts included within the high school district shall be called and held to consider the calling of an election to vote upon the question of approving a special levy for high school purposes. Provided, that any other member designated by the board of trustees of any such common school district may represent such district in place of the chairman thereof. If a majority of the board of trustees of the high school district and the designated representatives of said common school districts attending such meeting shall determine that the proposed expenditures are necessary for the proper maintenance and operation of such high school, said trustees of the high school district shall ascertain and determine the number of mills required to be raised by special levy, and shall call an election for the purpose of submitting the question of making such additional levy to the qualified electors who are taxpayers voting at such election, the result of said election shall be certified to the board of county commissioners, and the levy approved by such majority vote shall be made upon all property within said high school district."

This section permits the qualified electors of a high school district to authorize an additional levy to support a high school which levy would be made over the entire high school district. It is important to observe that the statute states that one levy may be made for the high school of the district. As a general rule, there is only one high school in each high school district, but under the facts here there are two high schools in a high school district. The taxing unit is the high school district and the additional levy may be imposed for high school purposes on this taxing district. The authorized purpose as stated in the

statute is to permit an additional levy to raise money for high school purposes above the foundation program. The total amount needed for high school purposes in the district should be incorporated in this single levy. If each of the high schools needs additional funds, then only one question incorporating the full amount of each high school should have been submitted to the electors. Submitting the question in this manner would comply with the language used in the statute which requires but one additional levy and also prevent discrimination between the two schools within the taxing area. Section 11 of Article XII of the Montana Constitution requires uniformity in taxation and in Com. v. Alden Coal Co. 251 Pa. 134, 96 A 246, LRA 1916 F 154, it was held that the constitutional provision that taxation shall be uniform applies not only to the levy and assessment of the tax, but to its expenditure and distribution as well. The submission of the two questions resulted in a tax over the high school district for the use of one of the two high schools, and as a consequence there was a lack of uniformity in the distribution of the funds.

The tax which was approved by the electorate of the common school district for the support of the high school of the common school district complies with Section 75-3801, R.C.M., 1947, as amended, and is uniform and not discriminatory.

It is therefore my opinion that:

1. In the submission of the question to the qualified electors of a high school district whether an extra levy should be authorized the amounts needed for each high school must be incorporated in one question.

2. An extra levy may be voted by the electorate of a school district for the use of the high school of the district although the school district is a part of a high school district.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 20 - 1955

Held: It is within the power and authority of the governing offices of school districts, cities and counties to provide in the current budget for the employer's contribution in anticipation of a favorable vote by referendum of the employees to be covered under the Social Security Act.

June 22, 1955

Mr. Norman C. Robb
County Attorney
Park County
Livingston, Montana

Dear Mr. Robb:

You have requested my opinion concerning the manner of financing the employer's share of Social Security coverage by cities, counties and school districts.

Chapters 270 and 271, Laws of 1955, extend coverage under the Federal Social Security Act to employees of the state and to political subdivisions and to members of the staff and teachers of school districts of the state. It is to be noted that both of these laws were not specifically made operative on passage and approval and as a consequence under Section 43-507, R.C.M., 1947, both statutes become effective July 1, 1955.

It is to be noted that under Section 218 (d) (3) of the Social Security Act, a referendum of the employees must be held and a majority must approve coverage under the Social

Security Act. Ninety days notice of such referendum must be given and as the law is not effective until July 1, 1955, the earliest date for such an election will be approximately October 1. However, budgets for cities, counties and school districts must be adopted prior to October 1, and as a consequence, a favorable vote for coverage under the Social Security Act by the employees of these governmental units would impose an immediate obligation on each governmental unit. The trustees of the school districts, the boards of county commissioners and the councils of cities may anticipate in their budgets that each as an employer must make contribution for the Social Security coverage.

The source of the money for such payments must be the general fund of each governmental subdivision. No additional levy may be made for the employer's contribution for Social Security and this is in direct contrast with the contributions to the Retirement Systems. Section 68-603, R.C.M., 1947, authorizes the city to make payment from each fund from which compensation for personal services are paid and, if general revenue sources are insufficient, then a special tax may be levied. A similar provision is made in Section 75-2709, R.C.M., 1947, for school districts.

As there is no statutory authorization for the levying of a special tax to meet the employer's contribution by cities, counties and school districts for the Social Security of its

employees, each unit must provide in the general fund for such an expenditure. If the governing offices of each of these political subdivisions propose to call a referendum and anticipate a favorable vote, it would appear advisable to include in the budget now being prepared an item for such liability. In the event the employees did not cast a favorable vote on the question of coverage under the Social Security Act, then such funds so appropriated in the budget may be carried in the budget and used in a subsequent budget as cash on hand.

It is therefore my opinion that it is within the power and authority of the governing offices of school districts, cities and counties to provide in the current budget for the employer's contribution in anticipation of a favorable vote by referendum of the employees to be covered under the Social Security Act.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 27 - 1955

Held: 1. In determining the maximum amount for which a high school district may become indebted, the proposed indebtedness must be apportioned among the common school districts comprising the high school on a proportionate valuation basis. If such proposed indebtedness will result in any one common school district's exceeding five per cent of its valuation when the amount so apportioned is added to the outstanding indebtedness of the common school district, then the amount of the proposed indebtedness of the high school district which causes the common school district to exceed five per cent of the value of the common school district is invalid.

2. In determining the limitation of indebtedness of a common school district, the proportionate share on a valuation basis of the outstanding indebtedness of the high school district must be deducted from five per cent of the valuation of the common school district, and the amount remaining is the limit of additional indebtedness which may be incurred by such common school districts.

July 13, 1955

Mr. Charles W. Jardine
County Attorney
Powder River County
Broadus, Montana

Dear Mr. Jardine:

You have requested my opinion as to whether the maximum

amount a high school district may become indebted is five per cent of the valuation of the property of the high school district irrespective of the debt of any of the component common school districts. You have also asked if the common school district may become indebted to the full five per cent of the valuation of the property in the district when there is outstanding indebtedness incurred by the high school district of which the common school district is a part.

In answering your questions it is first necessary to consider the three taxing units which may issue bonds for high schools. County bonds may be issued for the construction of county high schools as is provided in Section 75-4112, R.C.M., 1947. In Hamilton v. the Board of County Commissioners, 54 Mont. 301 169 Pac. 729, it was held that county bonds issued for the purpose of constructing a county high school are obligations of the entire county. In State ex rel. Henderson v. Dawson County, 87 Mont. 122, 286 Pac. 125, it was again recognized that bonds issued by a county for the construction of a county high school are county obligations and that a county in issuing such bonds lends the credit of the county for high school purposes. This case specifically stated that outstanding county high school bonds do not limit school districts in the incurring of indebtedness. There is no statutory method now for the

establishment of county high schools.

High school districts are established under the provisions of Chapter 46, Title 75, R.C.M., 1947, and a county may be divided into one or more high school districts. From your letter it appears that your county has been designated as one high school district.

Section 6 of Article XIII of Montana Constitution limits the indebtedness which may be incurred by school districts to five per cent of the value of the taxable value of the district.

The procedure for issuing high school district bonds is the same as that for the issuance of school district bonds. Section 75-4604, R.C.M., 1947, makes all the laws pertaining to the issuance of bonds by school districts applicable to the issuance of bonds by school districts. Section 75-4603, R.C.M., 1947, states that the limitation for indebtedness for high school districts is that it is not reduced by the indebtedness of the common school districts. In House v. School District No. 4, 120 Mont. 184 Pac. (2d) 285, this provision was held constitutional. A contrary conclusion was reached in Rankin v. Love, 125 Mont. 495, 240 Pac. (2d) 862, where the court held that high school districts have the authority to incur indebtedness so long as such indebtedness, when apportioned among common school districts in proportion to the assessed valuation of the property in each and this

part added to the existing indebtedness of the common school districts respectively, did not bring the debt of any of the latter in excess of the limit prescribed by Section 6, Article XIII of the Montana Constitution.

The converse of the above rule is also true in determining the limitation of indebtedness of a common school district. In ascertaining the possible limit of indebtedness of a common school district the proportionate share of outstanding indebtedness of the high school district must be deducted from the amount of additional indebtedness which may be incurred by such common school district.

It is therefore my opinion that in determining the maximum amount for which a high school district may become indebted the proposed indebtedness must be apportioned among the common school districts comprising the high school on a proportionate valuation basis. If such proposed indebtedness will result in any one common school district's exceeding five per cent of its valuation when the amount so apportioned is added to the outstanding indebtedness of the common school district, then the amount of the proposed indebtedness of the high school district which causes the common school district to exceed five per cent of the value of the common school district is invalid.

It is also my opinion that in determining the limitation of indebtedness of a common school district, the proportionate

share on a valuation basis of the outstanding indebtedness of the high school district must be deducted from five per cent of the valuation of the common school district, and the amount remaining is the limit of additional indebtedness which may be incurred by such common school districts.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

CHAPTER REFERENCES

The following official opinions of the attorney general can be found in Volume 21 of the Report and Official Opinions of the Attorney General.

Opinion 112 - 1946
Opinion 144 - 1946
Opinion 171 - 1946
Opinion 177 - 1946
Opinion 178 - 1946
Opinion 185 - 1946
Opinion 191 - 1946
Opinion 200 - 1946

The following official opinions of the attorney general can be found in Volume 22 of the Report and Official Opinions of the Attorney General.

Opinion 14 - 1947
Opinion 20 - 1947
Opinion 29 - 1947
Opinion 34 - 1947
Opinion 42 - 1947
Opinion 45 - 1947
Opinion 124 - 1948

The following official opinions of the attorney general can be found in Volume 23 of the Report and Official Opinions of the Attorney General.

Opinion 24 - 1949
Opinion 39 - 1949
Opinion 76 - 1949
Opinion 81 - 1950
Opinion 86 - 1950

The following official opinions of the attorney general can be found in Volume 24 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 29 - 1951
Opinion 33 - 1951
Opinion 46 - 1951
Opinion 73 - 1952
Opinion 101 - 1952

The following official opinions of the attorney general can be found in Volume 25 of the Report and Official Opinions

of the Attorney General. (To be published)

Opinion 92 - 1954

The following official opinions of the attorney general can be found in Volume 26 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 20 - 1955
Opinion 27 - 1955

CHAPTER VIII

TAXATION

Opinion 40 - 1949

Held: 1. Chapter 208, Montana Session Laws of 1949, which imposes a use tax upon trucks, trailers, semi-trailers, and automobiles operating over and upon the highways of the State of Montana does not apply to (A) school busses owned by a school district, and (B) school busses owned by a private individual and used exclusively for the purposes of transporting school children.

2. Chapter 208, Montana Session Laws of 1949, does apply to school busses owned by a private individual and used partly for the transportation of school children and partly for other purposes.

July 23, 1949

Mr. Robert J. Nelson
County Attorney
Great Falls, Montana

Dear Mr. Nelson:

You have requested an opinion of this office concerning Chapter 208, Montana Session Laws of 1949.

Chapter 208, Montana Session Laws of 1949 provides in part for a use tax on trucks, trailers, semi-trailers, and automobiles operating over and upon the highways of the State of Montana. You specifically inquire whether the tax imposed by Chapter 208 applies in the following three cases, all involving trucks and busses operated for the purpose of transporting school children:

1. Where the school bus is owned by a school district.

2. Where the school bus is owned by a private individual bus is used exclusively for the purpose of transporting school children.

3. Where the school bus is owned by a private individual and is used partly for other purposes.

Section 1998, R.C.M., 1935, contains the general statutory exemptions from taxation. Section 1998 reads in part as follows:

> "The property of the United States, the State, Counties, cities, towns, school districts, municipal corporations, public libraries, such other property as is used exclusively for agricultural and horticultural societies, for educational purposes, places of religious worship,...are exempt from taxation...."

As was pointed out at length in Op. No136, Vol. 23, Report and Official Opinions of Attorney General, Section 1998, supra, provides for two distinct classes of property, (1) that property which is absolutely exempt, consisting of the property of the United States, the State, Counties, School Districts, etc., and (2) that class of property which is exempt only when used exclusively for certain enumerated purposes.

A school bus owned by a school district falls in the first classification of property and therefore as stated above is absolutely exempt from taxation.

A school bus owned by an individual and used exclusively for the purpose of transporting school children falls in

class 2 of Section 1998 and is exempt from taxation if it is in fact used exclusively for the transportation of school children. However, it is incumbent upon the owner to claim such exemption and make satisfactory proof of the exclusive use of the property.

A school bus owned by an individual and used partly for transportation of school children and partly for other purposes falls in neither of the classes of property set out in Section 1998 and therefore such a bus is not exempt from taxation.

Therefore, it is my opinion that a school bus owned by a school district is exempt from taxation, a school bus owned by a private individual and used exclusively for the transportation of school children is exempt from taxation upon claim and proof of exemption and that a school bus owned by a private individual and used partly for the transportation of school children and partly for other purposes is not exempt from taxation.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 79 - 1950

Held: 1. A tax erroneously collected due to errors in the Treasurer 's books which show a deficit and registered warrants for a school district when in fact there were no registered warrants and deficit,may be refunded under the provisions of Section 2272, R.C.M., 1935, as amended by Chapter 201, Laws of 1939 (now Section 84-4176, R.C.M., 1947). Such refund can only be made where there is strict compliance with the statute as to the time and manner of making claim for refund.

January 7, 1950

Mr. John J. Cavan
County Attorney
Wheatland County
Harlowton, Montana

Dear Mr. Cavan:

You have requested my opinion concerning the refunding of taxes which were levied for a school district in your County. You advised me that the books in the County Treasurer's office showed a deficit and outstanding registered warrants for the district at the time taxes were levied and subsequent to such time it appeared that the books were erroneous and there was a balance to the credit of the school district.

It is apparent that the increase in levy for the school district in question would not have been made if the treasurer's books did not erroneously show that there were outstanding warrants that would have to be paid. In other words the

additional levy was due to a bookkeeping error and resulted in an unjustified levy.

Section 2222, R.C.M., 1935, as amended by Chapter 201, Laws of 1939 (now Section 84-4176, R.C.M., 1947) provides:

> "Any taxes, percentum and costs, heretofore or hereafter, paid more than once or erroneously or illegally collected, may, by order of the County Commissioners, be refunded by the County Treasurer."

In Christofferson v. Choteau County, 105 Mont. 577, 74 Pac. (2d) 427, the court considered the Montana cases which had previously construed Section 2222, supra, and held that the Section would apply to taxes erroneously collected and that a previous decision of the court which stated that such recovery could not be had was inadvertently made. The court adopted the rule that an erroneous assessment occurs when the taxing officers have power to act but err in the exercise of that power and that an illegal assessment takes place when they have no power at all to act. Applying this rule to the facts submitted it is apparent that a refund by the Board of County Commissioners would be proper as the misinformation shown by the Treasurer's books led to an erroneous collection of the tax. It is also important to remember that such refund can be made only if there is strict compliance with Chapter 201, Laws of 1939, which designates the time and the manner in which claim for refund can be made.

This problem has been previously considered by the office

in Opinion No. 129, Vol. 20, Report and Official Opinions of the Attorney General and also in Opinion No. 485, Vol 19, Report and Official Opinions of the Attorney General and these opinions are in accord with the views expressed here.

It is therefore, my opinion that a tax collected, due to errors in the Treasurer's books which show a deficit and registered warrants for a school district when in fact there were no registered warrants and deficit, may be refunded under the provisions of Section 2222, R.C.M., 1935, as amended by Chapter 201, Laws of 1939 (now Section 84-4176, R.C.M., 1947). Such refund can only be made where there is strict compliance with the statute as to the time and manner of making claim for refund.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 60 - 1954

Held: Buildings owned by an educational institution and used exclusively as residences for the principal and teachers of the school are exempt from property taxation as property used exclusively for educational purposes under the provisions of Article XII, Section 2 of the Montana Constition, and Section 84-202, R.C.M., 1947.

February 4, 1954

Mr. Michael J. O'Connell
County Attorney
Gallatin County
Bozeman, Montana

Dear Mr. O'Connell:

You have asked my opinion upon the following question:

> "Are buildings used as residences for the principal and teachers of a school owned and operated by a religious society exempt from property taxation under the provisions of Article XII, Section 2 of the Constitution of Montana, and Section 84-202, R.C.M., 1947?"

You have supplied me with these additional facts: the school is primarily for members of the religious society; it is in a rural area several miles from the nearest city; and it has boarding pupils as well as day pupils.

The Constitutional provision permitting exemption of property from taxation is Article XII, Section 2 of the Montana Constitution and it provides as follows:

> "Sec. 2. The property of the United States, the state, counties, cities, town, school districts, municipal corporations, and public libraries shall be exempt from taxation; and such other property

> as may be used exclusively for the agricultural and horticultural societies, for educational purposes, places for actual religious worship hospitals, and places of burial not used or held for private or corporate profit, institutions of purely public charity and evidences of debt secured by mortgages of record upon real or personal property in the State of Montana, may be exempt from taxation."

The statute enacted pursuant to this constitutional provision is Section 84-202, R.C.M., 1947, which provides in part:

> "Exemptions from Taxation. The property of the United States of America, the state, counties, cities, towns, school districts, municipal corporations, public libraries, such other property as is used exclusively for agricultural and horticultural societies, for educational purposes, places of actual religious worship, hospitals and places of burial not used or held for private or corporate profit, and institutions of purely public charity, evidence of debt secured by mortgages of record upon real or personal property in the state of Montana, and public art galleries and public observatories not used or held for private or corporate profit, are exempt from taxation, but no more land than is necessary for such purpose is exempt...."

Since nothing in the statement of facts indicates that the residences in question are primarily used for religious worship, it appears that the exemption is not claimed for a "place of actual religious worship", but rather is based upon the use of the property "exclusively ... for educational purposes."

The first, and leading case upon the question of exemptions in this state, Montana Catholic Missions v. County of Lewis and Clark, 13 Mont. 559 35 Pac. 2 laid down the rule which has been followed consistently. That rule, briefly stated, is that

the exemption applies to the property itself, and not to the institution owning the property. Under this rule, the fundamental consideration is the use to which the property is being put at the time that the exemption is claimed. If it is being used to earn a profit, the property is not exempt.

This rule has been followed in numerous opinions issued by this office. In 6 Opinions of the Attorney General 282, it was held that portions of a Y.M.C.A. building actually used by the association in carrying on its work, including rooms rented to members for living quarters are exempt from taxation, because used exclusively for educational and charitable work. In 22 Opinions of the Attorney General 184, No. 113, it was stated that a charitable institution is not entitled to an exemption from taxation on property which it leases or holds for revenue. In 23 Opinions of the Attorney General 93, No. 36, this office held that the determining factor in deciding whether property used by a hospital association is entitled to exemption is whether or not the dominant and substantial use of the property is for benevolent and non-profit purposes, rather than to make a profit for the individuals who comprise the association. It is the primary duty of local taxing authorities to investigate claims for exemption and determine whether as a matter of fact, the dominant and substantial use of the property is for an exempt purpose. This investigation will determine whether the above stated rules of law apply in the particular situation.

There has been no Montana case or previous opinion of this office on the subject of residences for teachers at educational institutions. However, there have been recent decisions in states having substantially the same requirement for exemption as our own.

In the case of Application of Thomas G. Clarkson Memorial College, 77 N.Y.S. (2d) 182, it was held that the residences of teachers are exempt from property taxation. The court said:

> "In all fairness, we may take notice of the fact that colleges will find it difficult to obtain teachers unless they can provide or find living quarters for them. It is sheer nonsense to assume that the educational process is not progressing in the residences of the teaching staff. Preparations have to be made for recitations, lectures and examinations and duties consequent thereto, to say nothing of meetings with the students, either singly or in groups. Students engage in educational activities in their rooms; teachers do the same in their homes."

The result in this case is essentially identical with the conclusion reached by Attorney General Poindexter in 6 Opinions of the Attorney General 282, supra, in which he held that the portion of a Y.M.C.A. used as rooms for members was used exclusively for education and charitable purposes and was therefore exempt.

It is therefore, my opinion that buildings owned by an educational institution and used exclusively as residences for the principal and teachers of the school are exempt from property taxation as property used exclusively for educational

purposes under the provisions of Article XII, Section 2 of the Montana Constitution, and Section 84-202, Revised Codes of Montana, 1947.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

CHAPTER REFERENCES

The following official opinions of the attorney general can be found in Volume 23 of the Report and Official Opinions of the Attorney General.

Opinion 40 - 1949
Opinion 79 - 1950

The following official opinions of the attorney general can be found in Volume 25 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 60 - 1954

CHAPTER IX

CONSTRUCTION, REPAIRS, IMPROVEMENT

Opinion 223 - 1946

Held: Money received as insurance for the destruction by fire of a high school building, may not be expended for the building of an elementary school without authority therefore having first been procured from the electorate voting at an election called for that purpose. Money received as damages for the purpose of purchasing a site and building a new elementary school to take the place of one destroyed, without a vote of the electorate.

November 23, 1946

Mr. Frank J. Roe
County Attorney
Silver Bow County
Butte, Montana

Dear Mr. Roe:

You have requested my opinion concerning the following:

School District No. 1, Silver Bow County, contemplates the construction of a new elementary school. The district has on hand funds paid as compensation for the destruction of two elementary schools. There is also available insurance money paid to the district because of the destruction by fire of the high school. You ask if it is necessary to have the approval of the electorate of the district before these funds may be spent for the construction of a new elementary school.

This office previously held in Opinion No. 185, Volume 21, Report and Official Opinions of the Attorney General, a portion of the funds realized as compensation for the destruction of the two elementary schools could be used to purchase a new elementary school site which had been approved by the electorate. One of the reasons given was that the money realized from the settlement was a trust fund, earmarked for the construction of a school to replace the schools destroyed. The principal question involved here is whether or not the board of trustees of School District No 1, of Silver Bow County has authority to expend cash on hand for the purpose of erecting an elementary school to replace two elementary schools damaged to the extent they had to be abandoned, without first having obtained authority from the electors. The cash on hand consists of the sum of $300,000.00 received as insurance for the destruction by fire of an abandoned high school, and the further sum of $100,000.00 received for damage to the elementary schools.

Our Supreme Court in the case of State ex rel. Diederichs v. Board of Trustees, 91 Mont. 300, 7 Pac. (2d) 543, held that insurance money received as a consequence of the destruction by fire of a county high school could be used to construct or rebuild a high school to replace the one destroyed, without first having submitted the question to a vote of the electorate. The court in deciding the question of whether or not the expenditures of the insurance money came within the constitutional prohibition as to creating a debt or liability, said:

"...The fire converted the building into money available only for the reconstruction of the high school and consequently, since the original purpose has been given approval by the electors, there is now no useful purpose to be subserved by again submitting the question of the proposed expenditure to the people for approval, nor does the Constitution or law require it....:

It seems plain that the constitutional limitation does not apply to the expenditure of cash on hand provided for a specific purpose; but rather to the creation of an obligation to be met and paid in the future by the taxpayers."

Applying the law as laid down in the Diederichs case to the facts here, the money received as insurance from the destruction of the high school may be used only for the purpose of replacing the high school, and for no other purpose, without a vote of the electorate. It could not be used for the purpose of building an elementary school, for the reason that the original funds approved by the electorate were for a different purpose, that is for the building of a high school. The same is true of the money received for damages to the elementary schools. That money may be used for the purpose of building an elementary school to take the place of the ones destroyed, and for no other purpose, without a vote of the electorate.

Under the provisions of paragraph 8 of Section 1015, R.C.M, 1935, as amended, before the trustees may build the new school or procure a new site they must first be authorized to do so by a majority vote of the electors of the district.

I am advised that the trustees have already been authorized

to procure a site, and in fact, the same has already been purchased. I do not understand, however, that the trustees were also authorized to build a school building on this site. If not, then this question must be submitted to the electorate. At the same time the question as to the expenditure of the funds received as insurance for destruction of the old high school could be submitted to the electorate.

It is therefore my opinion that money received as insurance for the destruction by fire of a high school building, may not be expended for the building of an elementary school without authority therefore having been first procured from the electorate voting at an election called for that purpose.

It is further my opinion that money received as damages for destruction of elementary school buildings may be used for the purchase of a site and building a new elementary school to take the place of the one destroyed without a vote of the electorate.

Very truly yours,

R. V. BOTTOMLY
Attorney General

Opinion 98 - 1950

Held: 1. Bidders upon Rural Improvement District Works, Special Improvement District Works, and upon the construction of State buildings or the alteration, repair and improvement of State buildings and grounds must accompany such bids with designated security in the form of a certified check. In addition to the aforementioned situations wherein the security is required by statute, a Board of County Commissioners and a Board of School District Trustees may in the exercise of their respective discretion and judgment require that bidders upon county and school district contracts deposit security with their bids as a means of insuring that all bidders are responsible parties.

March 9, 1950

Mr. Melvin E. Magnuson
County Attorney
Lewis and Clark County
Helena, Montana

Dear Mr. Magnuson:

You have requested my opinion upon the following question:

> "Can contractors submit certified checks, cashier's checks, or bid bonds as security upon the submission of bids to perform county or school district construction work in Montana?"

As examination of the Montana Statutes reveals that there are no provisions of the law which require that contractors for general county or school district work must furnish security upon the submission of a bid. There are, however, several specific statutes requiring bidders upon public works

to furnish security upon the submission of bids. They are as hereinafter set forth.

Section 16-1607, R.C.M., 1947, provides that all bids submitted upon Rural Improvement District Work must be accompanied by a certified check payable to the Board of County Commissioners, certified by a responsible bank for an amount which shall not be less than ten per cent (10%) of the aggregate of the proposal.

Section 11-2209, R.C.M., 1947, provides that all bids submitted upon Special Improvement District Work must be accompanied by a certified check payable to the city, certified by a responsible bank for an amount which shall not be less than ten per cent (10%) of the aggregate of the proposal. Section 82-1133, R.C.M., 1947, provides that when bids are submitted to the State Board of Examiners for the construction of state buildings or the alteration, repair and improvement of state buildings and grounds, such bids must be accompanied by a certified check for five per cent (5%) of the amount of the bid.

Apart from the three above cited provisions, the law is silent as to any requirement that security be deposited with a bid upon any public work in the State of Montana. Your question thus becomes whether or not the Board of County Commissioners or the School District Board of Trustees may, in the absence of statute, require that bids upon construction

work be accompanied by a certain designated form of security.

Section 16-1025, Revised Codes of Montana, 1947, grants to the Board of County Commissioners the jurisdiction and power under such limitations and restrictions as are prescribed by law to make and enforce such rules for its government, the preservation of order and the transaction of business, as may be necessary.

Section 75-1624, Revised Codes of Montana, 1947, provides that the board of trustees of each school district shall have custody of all school property belonging to the district and shall have the power to transact all business necessary for maintaining schools and protecting the rights of the district.

Certainly the powers granted to Boerd of County Commissioners and School District Trustees by the statutes contained in the preceding two paragraphs are extensive enough, in my opinion to include the authority to establish uniform regulations and procedures to be followed in the submission of bids for county or school district contracts. If in the exercise of their respective discretion and judgment the governing boards of counties and school districts decide that the requirement that bidders on county and school district contracts deposit security with their bids will insure the obtaining of responsible bidders upon such projects, I can conceive of no reason under the law why such a regulation cannot be promulgated and required.

It is therefore my opinion that bidders upon Rural Improvement

District Works, Special Improvement District Works, and upon the construction of state buildings or the alteration, repair and improvement of state buildings and grounds must accompany such bids with designated security in the form of a legally sufficient certified check. In addition to the aforementioned situations wherein the security is required by statute, a Board of County Commissioners and a Board of School District Trustees may in the exercise of their respective discretion and judgment require that bidders upon county and school district contracts deposit security with their bids as a method and means of insuring that all bidders are responsible parties.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 107 - 1950

Held: A school district has the authority to enter into a contract for the repair of a school building and provide in the contract for payment over a period of three years.

May 5, 1950

Mr. James T. Harrison
County Attorney
Phillips County
Malta, Montana

Dear Mr. Harrison:

You have requested my opinion concerning the authority of a board of trustees of a school district to enter into a contract for the repair of school buildings, the payment of which will be spread over a period of three years. You have advised me that the trustees complied with the law in requesting bids for material and labor in the repair of the school building.

This office, in Opinion No. 60. Volume 22, Report and Official Opinions of the Attorney General, considered the purchase of a school bus by a school district which was to be paid for over a period of three years. The opinion held that the district had the power to enter into such a contract and the reasoning in that opinion would apply with equal force to a contract for repair of a school building.

Section 75-1632, Revised Codes of Montana, 1947, enumerates the powers granted to a school board and one of these is the authority to repair school buildings. Section 75-1637, R.C.M.

1947, prohibits any school trustee from having any pecuniary interest in contracts for the repair of schools and it also provides that a contract for repair "where the amount involved is two hundred and fifty dollars, or more." must not be let without first advertising in a newspaper and calling for bids. This latter section does not prohibit contracts being made by the trustees, the payment for which shall extend over three years. Such manner of payment might well be a convenient method for meeting such necessary expenditures without unduly burdening the district in any one year.

Compliance with the budget law is necessary for such a contract and the annual payments under the contract, for elementary schools, must be included on Item 6 of Section 1 as found in Section 75-1703, R.C.M., 1947. For high schools the annual payment should be entered in subsection III, R.C.M. of Part I of the high school budget as provided in Section 75-4502, R.C.M, 1947. The repair of buildings could also be financed by a bond issue as subsection (a) of Section 75-3901 names the repair of school houses as one of the authorized bond purposes. However the trustees of the district are its managing officers and directors and have large discretionary power in managing school affairs.

It is therefore my opinion that a school district has the authority to enter into a contract for the repair of a school building and provide in the contract for payment over a period of three years.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 4 - 1951

Held: An architect's fee for drawing the plans and specifications for, and supervising the construction of a school building may be paid from the proceeds of the funds realized from the sale of bonds for the construction of such a building.

February 24, 1951

Mr. George D. Ore
County Attorney
Petroleum County
Winnett, Montana

Dear Mr. Ore:

You have requested my opinion as to whether an architect's fee may be paid from the funds realized from the sale of bonds for the construction of a school.

There is not a specific statute concerning the payment of an architect's fee and directing the manner of its payment.

Section 75-3922, R.C.M., 1947 provides in part as follows:

> "All moneys arising from the sale of such bonds shall be paid to the county treasurer and by him credited to the school district issuing the same, and shall be immediately available to the purpose for which the bonds were issued and not other purpose."

In view of this statute it is necessary to determine whether the expenditure of funds realized from the sale of bonds in payment of an architect's fee is included within the purpose of the bond issue. A helpful definition of an architect is found in 3 Am. Jur. 998, which reads as follows:

"An architect is one whose occupation it is to form

or devise plans and designs and draw up specifications for buildings or structures, and to superintend their construction."

It is apparent from this definition that the work of an architect is supervisory in nature, but enters into the construction of the building because of the fact that he plans the building from its initial stage to completion.

Our Supreme Court in Caird Engineering Works vs. Seven-up Mining Company, 111 Mont. 471 111 Pac. (2d) 1267, held that an architect is entitled to a mechanic's lien for furnishing plans and specifications for, and supervising the construction of a building. In granting such a lien the court recognized that the services of an architect were work and labor which entered into the construction of the building. If an architect may claim a lien for his fee then such a claim could also be paid from a building fund as it would be on the same basis as any laborer who performed services in the construction of the building. This office in Opinion No. 105, Volume 16, Reports and Official Opinions of the Attorney General held that an architect's fee could be paid from the general fund of a school district, and by implication, also held that such payment could also be made from the building account.

It is, therefore, my opinion that an architect's fee for drawing the plans and specifications for, and supervising the construction of a school building may be paid from the proceeds of the funds realized from the sale of bonds for the construction of such a building.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

CHAPTER REFERENCES

The following official opinions of the attorney general can be found in Volume 21 of the Report and Official Opinions of the Attorney General.

Opinion 223 - 1946

The following official opinions of the attorney general can be found in Volume 23 of the Report and Official Opinions of the Attorney General.

Opinion 98 - 1950
Opinion 107 - 1950

The following official opinion of the attorney general can be found in Volume 24 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 4 - 1951

CHAPTER X

TRANSPORTATION

Opinion 120 - 1946

Held: The State of Montana must pay to the school district one-third the cost of transportation by school busses in accordance with the schedule fixed by the Board of Education as provided in Section 1200.1, R.C.M., 1935, and also the state must pay to the district one-third of the amount paid to parents or guardians in lieu of bus transportation as provided in Section 7 of Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943, and Chapter 116, Laws of 1945, and the fact the per capita transportation cost is higher in one class than the other will not change the method of computing the amount of the state's reimbursement to the school district.

February 6, 1946

Miss Elizabeth Ireland
Superintendent of Public Instruction
State Capitol
Helena, Montana

Dear Miss Ireland:

You have submitted for my consideration the following question:

If a board of trustees of a school district puts on a bus and employs a bus driver to carry on transportation for the children in a school district, and if this bus transportation costs more than individual transportation (See Chapter 152, Section 7 of the 1941 School Laws), will the state be required to pay one-third of the cost of the bus transportation; or is the state required

to pay one-third of the cost of the transportation according to the schedule as given in the chapter and section quoted above?

In answering your question it is necessary to consider Section 13 of Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943, which reads in part as follows:

> "Each school district and each county high school meeting the requirements of this act shall be entitled to reimbursement from the state public school general fund in an amount not to exceed one-third (1/3) of the actual cost of transportation, or services rendered in lieu of transportation, annually on presentation to the state superintendent of public instruction, through the office of the county superintendent of schools, or certified claims for such reimbursement using for such purpose the forms provided by the state superintendent of public instruction. Such reimbursement shall be made in accordance with the provisions of Sections 1200.1, 1200.6, 1200.7 and 1200.9, of the Revised Codes of Montana, 1935, except that the schedule provided in this act for individual transportation, or services in lieu thereof, shall be used instead of any schedule which may have been heretofore or may hereafter be fixed and promulgated by the state board of education."

The above section differentiates between transportation by bus and individual transportation in that it provides "such reimbursement shall be made in accordance with the provisions of Sections 1200.1, 1200.6, 1200.7 and 1200.9 of the Revised Codes of Montana, 1935, except that the schedule provided in this act for individual transportation, or services in lieu thereof, shall be used..." The schedule for individual transportation, or services in lieu thereof, is found in Section 7 of Chapter 152, Laws of

1941, as amended by Chapter 189, Laws of 1943, and Chapter 116, Laws of 1945, which reads in part as follows:

> "The board of trustees may pay to the parents or legally appointed guardian of each child eligible for transportation under this act board or rent, or provide transportation for the child, the amount called for under the following schedule in lieu of furnishing bus transportation..."

It would appear, therefore, that the amount of reimbursement received by each district would be determined by two tests. In one class, bus transportation, the schedule fixed by the Board of Education by virtue of Section 1200.1 would be applied, and in the other class, individual transportation, the amount paid under the schedule set out in Section 7 of Chapter 152, Laws of 1941, as amended, would be applied. The fact that the cost per pupil for transportation is higher in one instance than the other does not affect the method of computation or the amount paid to the school district by the state. The transportation furnished determined the method of computing the one-third reimbursement by the state. The payments made under Section 7 of Chapter 152, Laws of 1941, as amended, states that payments made under the schedule found in Section 7 of Chapter 152, shall be used as a basis for computing the reimbursement for such individual transportation, or services in lieu thereof. All other transportation furnished by the district comes within the provisions of Section 1200.1, 1200.6, 1200.7 and 1200.9 of the Revised Codes of Montana, 1935.

It is therefore my opinion that the State of Montana must pay to a school district one-third the cost of transportation by school busses in accordance with the schedule fixed by the Board of Education as provided in Section 1200.1, Revised Codes of Montana, 1935, and also the state must pay to the district one-third of the amount paid to parents or guardians in lieu of bus transportation as provided in Section 7 of Chapter 152 Laws of 1941, as amended by Chapter 189, Laws of 1943, and Chapter 116, Laws of 1945, and the fact that the per capita transportation cost is higher in one class than the other will not change the method of computing the amount of the state's reimbursement to the school district.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 186 - 1946

Held: 1. Children whose parents have moved into a district and whose parents maintain a permanent residence within the district are entitled to the same school transportation privileges as are the other children of the district without regard to the length of residence of the parents within the district.

2. Children whose parents have moved into a school district which does not maintain an elementary school are entitled to attend the school in another district to which the children of the district are transported and the district of the parents residence must pay the proportionate amount for such pupil to the school attended as provided in Section 4, of Chapter 152, Laws of 1941.

3. The number of school trustees who must countersign school district warrants with the school district clerk is not fixed by statute, but the trustees may by appropriate resolution, provide for such counter signatures.

August 3, 1946

Mr. Bert L. Packer
County Attorney
Teton, County
Choteau, Montana

Dear Mr. Packer:

You have requested my opinion concerning the following questions:

1. What is the obligation of a school district to pay transportation and tuition for children who have moved into the district

from another county? You advise me the school district in question does not maintain an elementary school but provides transportation to an elementary school in another district.

2. What obligation does a school district have to pay transportation for elementary pupils who have moved from one district in the county to another district?

3. What number of trustees should sign warrants in school districts of the second and third class?

Your first two questions concerning transportation are answered by Opinion No. 272, Volume 19, Report and Official Opinions of the Attorney General, wherein it was held:

> "School trustees have the power to furnish transportation, or services in lieu thereof, for all pupils residing within their district and enrolled in the public schools of their district and also to pupils residing within their district who are enrolled in any Montana Public School and otherwise eligible under Section 9 of Chapter 152 of the Laws of 1941 to receive transportation aid."

As you will note, Section 9 of Chapter 152, Laws of 1941, does not require the residence in the district be for any fixed length of time as the section provides "such child must reside with his parents or legally appointed guardian, and his parents or guardian must maintain a permanent home within the boundaries of the district paying transportation." It is the district in which the permanent home is located which must pay the transportation and not the district from which the family moved, even though the move was made a short time before the request is made for transportation.

The payment of tuition for children who have moved into a school district which does not maintain an elementary school is covered by Section 4 of Chapter 152, Laws of 1941. Section 4 of Chapter 152 provides the trustees of a school district have the power to close an elementary school and transport the pupils to a school in another district, which appears to be the case from the facts you have given me. Section 4 also provides it shall be the duty of the school district which closes its schools to assist in the support of the schools of the district where the pupils attend in the direct proportion the number of pupils of the closed school bears to the number of pupils in the school attended.

Chapter 203, Laws of 1943, which amends Section 1013, R.C.M., 1935, provides for the transfer of school funds for children who attend elementary school in a district other than that of their residence. Section 1013, as amended, does not specifically recite the section has application only to individual applications for transfer and not the transfer of all the children of a school of one district in a school in another district, but such a construction would be reasonable and would also be in accord with the rule adopted in State v. Certain Intoxicating Liquors, 71 Mont. 79, 227 Pac. 472, which states:

> "In the construction of a particular statute, or in the interpretation of any of its provisions, all acts relating to the same subject or having the same general purpose, should be read in connection with it, as together constituting

> one law. And the law imposes a duty upon the judicial department to pursue the legislative intent so far as possible. It is our duty to reconcile the statutes, if possible, and make them operative."

Applying the above rule to Section 4 of Chapter 152, Laws of 1941, and Chapter 203, Laws of 1943, results in the conclusion Section 4 of Chapter 152 must be applied when an elementary school is closed and all of the students who normally attend the school are transferred to a school in another district. There is no requirement of authorization for such attendance, and, therefore, any pupil whose parents reside in the district is entitled to attend school in the district maintaining a school with the resulting obligation on the part of the district of the child's residence to pay the proportionate tuition requirement to the district where the child attends school.

There is no specific statutory requirement fixing the number of school trustees who must sign school warrants. Section 1019.22, R.C.M., 1935, provides in part: "The clerk of each school district must issue all warrants drawn against any fund of the district in triplicate...." Section 1019.23 contains the provisions "that no warrant must be issued by such clerk against such appropriation item which will exceed the unexpended balance of the appropriation therefor." These sections by inference would indicate the clerk may issue school warrants. However Section 1015, R.C.M., 1935, as amended, provides in part:

> "Every school board unless otherwise specially provided by law shall have the power and it shall be

its duty:
"1. To prescribe and enforce rules not inconsistent with law, or those prescribed by the superintendent of public instruction for their own government of schools under their supervision."

It would be both good business practice and to the best interest of the school district for the trustees to prescribe by resolution the number of trustees who must countersign school warrants before such warrants will be valid obligations of the district.

It is therefore my opinion:

1. Children whose parents have moved into a district and whose parents maintain a permanent residence within the district are entitled to the same school transportation privileges as are the other children of the district without regard to the length of the residence of the parents within the district.

2. Children whose parents have moved into a school district which does not maintain an elementary school are entitled to attend the school in another district to which the children of the district are transported and the district of the parents' residence must pay the proportionate amount for such pupil to the school attended as provided in Section 4 of Chapter 152, Laws of 1941.

3. The number of school trustees who must countersign school district warrants with the school district clerk is not fixed by statute, but the trustees may by appropriate resolution provide for such counter signatures.

Sincerely yours,
R. V. BOTTOMLY
Attorney General

Opinion 57 - 1947

Held: The alteration of the transportation schedule in accordance with subsection 8 of Section 7 of Chapter 152, Laws of 1941, as amended, is discretionary with the County Superintendent of schools. Such an alteration must be approved by the State Superintendent of Public Instruction and cannot be demanded as a matter of right by the parents of the children concerned.

August 19, 1947

Mr. M.L. Parcells
County Attorney
Stillwater County
Columbus, Montana

Dear Mr. Parcells:

You have requested my opinion as to whether the board of trustees of a school district has discretionary power to classify students who live more than three miles from an established bus route under subsection 8, Section 7, Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943, and Chapter 116, Laws of 1945.

Subsection 5 of Section 7, Chapter 152, Laws of 1941, as amended, provides:

> "School children living within one and one-half (1 1/2) miles of an established bus route shall not be eligible for transportation aid, other than the services of the established route. Children living more than one and one half (1 1/2) but less than three (3) miles from such route shall receive transportation aid of one-half (1/2) the rates given in subsection one (1) of the schedule set up in this section. Children living three (3) miles or more from such bus route shall receive transportation aid on the basis provided in the schedule fixed in this section."

The above quoted section requires the payment of transportation to children who live more than a mile and one-half from an established bus route.

Subsection 8 of Section 7, Chapter 152, Laws of 1941, as amended, states that in isolated cases "this schedule may be altered by the county superintendent of schools, with the consent and approval of the state superintendent of public instruction" and payments made in amounts greater than the amounts fixed by the schedule.

Under the facts submitted it does not appear that the school in the district has been closed, but the basis for transportation aid is that the children live more than three miles from the bus route. As was observed above, the children are eligible to transportation in accordance with the schedule. Subsection 8 was enacted to take care of the unusual situation such as the closing of a school or the difficulties of transportation, but the alteration of the schedule is permitted by the county superintendent with the consent of the State Superintendent of Public Instruction. The use of the word "may" together with the requirement of approval indicates that the change in the schedule is discretionary with the county superintendent and not mandatory and that justification must be shown in each case.

It is therefore, my opinion that the alteration of the transportation schedule in accordance with subsection 8 of

Section 7 of Chapter 152, Laws of 1941, as amended, is discretionary with the County Superintendent of Schools. Such an alteration must be approved by the State Superintendent of Public Instruction and cannot be demanded as a matter of right by the parents of the children concerned.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 60 - 1947

Held: 1. A school district is not required to advertise for bids in the purchase of a school bus, although it may do so where the trustees deem it for the best interests of the district. 2. A school district may purchase a school bus under a conditional sales contract and pay for the same over a period of three years.

August 20, 1947

Mr. J.M. Watts
County Attorney
Musselshell County
Roundup, Montana

Dear Mr. Watts:

You have submitted for my consideration the following questions:

1. Must a school district advertise for bids when the district purchases a school bus?

2. May the board of trustees of a school district purchase a school bus on a conditional sales contract payable over a period of three years?

In answering your first question it is necessary to consider Section 1016, R.C.M., 1935, which provides in part:

> "No board of trustees shall let any contract for building, furnishing, repairing, or other work, for the benefit of the district, where the amount involved is two hundred fifty dollars, or more, without first advertising in a newspaper published in the county for at least two weeks, calling for bids to perform such work..."

It would appear that the above prohibition applies to school buildings, furnishing for the same and work and labor. A school bus would not come in any of the classes enumerated in the statute. Also, section 1016 was enacted prior to the present transportation act, Chapter 152, Laws of 1941, and its amendments. In other words, the purchase of a school bus was not possible at the time section 1016 became a law and its terms are not broad enough to prohibit the purchase of a bus without first calling for bids.

Section 3 of Chapter 152, Laws of 1941, provides:

> "The board of trustees shall have the power to purchase or rent and provide for the upkeep, care and operation of school busses: or to contract and pay for the transportation of eligible pupils, such contracts to run for terms not to exceed three (3) years."

It is to be noted that a contract for transportation cannot exceed three years but no limitation is placed on the manner of purchase of school busses. A broad power is granted for the purchase of school busses and the manner of purchase is not designated.

Section 1022, R.C.M., 1935, grants to school districts the power to purchase personal property for school purposes. Section 1015, R.C.M., 1935 as amended, defines the duties of school trustees, but neither section limits the power to contract over a period of years. In Bennett v. Petroleum County, 87 Mont. 436, 288 Pac. 1018, our Court considered the

validity of a contract entered into by a county which would cover a period of four years and held that the fact the county obligation would extend beyond the term of office of members of the existing board would not make the contract invalid.

In Arnold v. Custer County, 83 Mont. 130, 269 Pac. 396, the Court stated:

> "When the statutes require an act to be done by a county official or county officials and do not provide a method of doing it, any reasonable and suitable means may be adopted."

This rule would have application in the problem here presented, and the purchase of a bus under a conditional sales contract would appear to be a reasonable method.

Section 1019.14, and Section 1263.14, R.C.M., 1935, limit the expenditures for any fiscal year to the amount appropriated for that year.

The conditional sales contract proposed would fix a definite amount payable each year, and so long as the annual installments are included in each budget these sections would furnish no obstacle to such a three year term contract.

The amount of the annual installments to be paid for the purchase of a bus must be included in Section 1 of the General Fund Expenses, for elementary schools, under the item of "New Equipment -- Not financed from sale of bonds," Section 1019.3. In the case of High Schools, payment should be made under the

item "New Equipment" which is found in the "Capital Outlay" Account, Section 1263.2, R.C.M., 1935. There is no authority for the purchase of a bus by the issuance of bonds.

It is therefore, my opinion:

1. A school district is not required to advertise for bids in the purchase of a school bus, although it may do so where the trustees deem it for the best interests of the district.

2. A school district may purchase a school bus under a conditional sales contract and pay for the same over a period of three years.

Sincerely yours,

R. V. BOTTOMLY,
Attorney General

Opinion 13-1949

Held: The one-third contribution of school districts for their elementary school transportation budgets is to be paid from the five mill district levy authorized by Section 10, Chapter 199, Session Laws of 1949, if there are sufficient funds remaining after deducting the operation and maintenance costs of the budgets for the elementary schools. If there are not sufficient funds remaining, then an additional levy may be made without an election to meet the district's one-third obligation for transportation. The one-third contribution of the County for the transportation budgets of the elementary schools is to be paid from the ten mill levy authorized by Section 1202 of the R.C.M., 1935, as amended by Section 11, Chapter 199, Session Laws of 1949, in accordance with the schedule set out in Chapter 200, Laws of 1949.

The two-thirds contribution or balance of each county for the high school transportation budget is paid from a separate transportation county wide levy authorized by sub-section (b) of Section 14, Chapter 152, Session Laws of 1941, as amended by Chapter 189, Session Laws of 1943.

April 11, 1949

Miss Mary M. Condon
State Superintendent of Public Instruction
State Capitol
Helena, Montana

Dear Miss Condon:

You have requested my opinion concerning the effect of

Chapters 199 and 200, Laws of 1949, as to payments to be made by school districts for both elementary and high school transportation budgets.

Prior to the enactment of Chapter 199, Laws of 1949, (H.B. 161) the elementary schools' one-third of the transportation budgets was paid under the provisions of Subsection 1, Section 14 of Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943, from the ten mill district levy authorized by Section 1203, R.C.M., 1935 as amended by Chapter 51, Laws of 1945. Section 1203 as amended was repealed by Chapter 199, Laws of 1949 and as a consequence the school district's contribution to the transportation budget must be found in Chapter 199, Laws of 1949. Section 10 of Chapter 199 amends Section 1019.19 of the R.C.M., 1935, and provides for a five mill district levy for elementary school budgets. As the previous source of the district's contribution has been repealed, Section 1203 as amended, it is reasonable to assume that an elementary budget must pay its contribution to the transportation budgets from the five mill levy. However, if the budgets for the operation and maintenance of the elementary schools of a district will utilize all of the proceeds of the five mill levy, and the authorized twenty per cent increase over such an amount, then under Subsection 2, Section 14 of Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943, an additional levy for transportation may be made in such number of mills as will raise

not to exceed one-third of the total amount set out in the Budget for transportation without being authorized at an election. An additional levy for transportation may be authorized by the qualified electors of the district. It is to be noted that the State's contribution for bus transportation is to be computed by the schedule fixed by Chapter 200, Laws of 1949, which might not cover the one-third of the approved budgets with a resulting deficiency to be paid by the district from any excess amount above its one-third contribution remaining from the district five mill levy or from the levy authorized by the electors of the district. Opinions No. 120 and 178, Volume 21, Report and Official Opinions of the Attorney General.

The county's one-third share of the transportation costs for elementary schools will be paid from the ten mill levy provided for in Section 1202, R.C.M., 1935, as amended by Chapter 273, Laws of 1947, and Chapter 199, Laws of 1949. The authority for such contribution of the County's one-third is found in Subsection (b), Section 13 of Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943, Chapter 169, Laws of 1947, and Chapter 200, Laws of 1949. This contribution by the county is fixed at one-third of the schedule and a deficiency may be incurred from such computation in the same manner that was pointed out above in regard to the state's one-third contribution.

District and County high schools receive reimbursement

from the State for one-third of their transportation budgets, computed according to the schedule in the manner outlined in Opinion No. 120, Volume 21, Report and Official Opinions of the Attorney General. Chapter 200, Laws of 1949, increases and fixes the bus transportation schedule but does not alter the method of computation defined by the above cited opinion of this office. The remaining two-thirds or balance of the high school transportation costs is paid from a County-wide tax which is not limited in amount as Subsection (b) of Section 14, Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943, reads:

> "...The County Commissioners, except as hereinafter provided, shall make a county-wide levy of such number mills as will raise such total."

It is my opinion:

1. The one-third contribution of school districts for their elementary school transportation budgets is to be paid from the five mill district levy authorized by Section 10, Chapter 199, Laws of 1949, if there are sufficient funds remaining after deducting the operation and maintenance costs of the budgets for the elementary schools. If there are not sufficient funds remaining then an additional levy may be made without an election to meet the district's one-third obligation for transportation.

2. The one-third contribution of the county for the transportation budgets of the elementary schools is to be paid from

the ten mill levy authorized by Section 1202, R.C.M., 1935, as last amended by Section 11, Chapter 199, Laws of 1949, in accordance with the schedule set out in Chapter 200, Laws of 1949.

3. The two-thirds contribution or balance of each county for the high school transportation budgets is paid from a separate transportation county-wide levy authorized by Subsection (b) of Section 14, Chapter 152, Laws of 1941, as amended by Chapter 189, Laws of 1943.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 57 - 1949

Held: 1. Under Chapter 200, Laws of 1949, the Board of Trustees of any School District or County High School has discretionary power in the furnishing of transportation to the students of the District.

2. If the Board of Trustees elects to furnish transportation to any students within the District, they must furnish such transportation to all students within the District.

September 21, 1949

Mr. James H. Higgins
County Attorney
White Sulphur Springs, Montana

Dear Mr. Higgins:

You have requested my opinion concerning the interpretation to be placed on the word "may" as found in Section 1, Chapter 200, Laws of 1949, in which the following language is used.

> "The Board of Trustees of any School District or County High School within the State of Montana may furnish transportation to and from schools for all pupils residing in their Districts..."

Prior to the amendment of Section 1, Chapter 152, Laws of 1941, by Chapter 200, Laws of 1949, it was provided that the Board of Trustees "shall have the power to" furnish transportation and the legislature by the amendment substituted the word "may" for "shall have the power to" The question thus presented is whether the use of the word "may" is to be construed as mandatory. Prior to the amendment of Section 1, Chapter 152,

supra, this office in Opinion No. 111, Vol. 19, Report and Official Opinions of the Attorney General, held that the trustees of a School District had a discretionary power in the furnishing of transportation. In Opinion No. 240, Vol. 20, Report and Official Opinions of the Attorney General the same conclusion was reached and it was also held that if the Trustees decided to furnish transportation to any students they must furnish it to all students within the District.

The legislature had before it the above cited interpretations of Section 1 of Chapter 152, Laws of 1941 when the Section was amended by Chapter 200, Laws of 1949. The substitution of the word "may" for "shall have the power to" is not, in my opinion, such an expression of the legislative intent as to indicate a material change in the interpretation to be placed on the statutes. Our Supreme Court has frequently considered the meaning of the word "may" and in Durland v. Prickett, 98 Mont, 397, 39 Pac. (2d) 652 the court quoted from an earlier Montana case, in construing the word, the following:

> "This word is sometimes permissive only; sometimes it is imperative. Legislative intent determines whether it is directory or mandatory."

It is more than a reasonable assumption that if the legislature had intended to deprive the trustees of their discretionary power to furnish transportation more explicit language would have been used, than the substitution of the

word "may."

It is, therefore my opinion that under the provisions of Chapter 152, Laws of 1941, as amended by Chapter 200, Laws of 1949 the Board of Trustees of a school has discretionary power in the furnishing of transportation to the students of the District.

It is also my opinion that if the Trustees furnish transportation to any students they must furnish transportation to all within the limitations of the law.

Very truly yours,

ARNOLD H. OLSEN
Attorney General.

Opinion 84 - 1950

Held: The payment for transportation to be made by the parents or guardian of a student attending a private or parochial school may be determined by dividing the total number of students using the bus, including thoseattending the private or parochial school, into the cost of operating the bus as fixed by the current transportation budget.

January 21, 1950

Mr. Millton G. Anderson
County Attorney
Richland County
Sidney, Montana

Dear Mr. Anderson:

You requested my opinion concerning the meaning of "proportionate share of the cost of transportation" which the parents or guardian of a child attending a school other than a public school must pay in order to entitle such child to ride on a school bus, as provided in Section 8, Chapter 152, Laws of 1941.

This office has previously considered the question of the use of public school moneys for transportation of pupils attending a private or parochial school and in Opinion No. 228, Vol. 19, Report and Official Opinions of the Attorney General it was held that "public school moneys may not be expended for transportation for a student attending a private or parochial school." This opinion was recognized and approved by a later opinion of this office, Opinion No. 74, Vol. 21, Report and Official Opinions of the Attorney General, wherein it was also held:

> "School trustees have the discretionary power to permit pupils attending private or parochial schools to ride on public school busses and the parents or guardian of such children pay their proportionate share of the cost of such transportation."

In determining the meaning of the phrase "proportionate share of the cost of transportation," the case of Hochsprung v. Stevenson, 82 Mont. 222, 266, Pac. 406, is helpful as it is stated therein, "Proportionate' means adjusted to something else according to a certain rate of comparative relation." Dividing the total number of pupils using a bus, including those attending a private school, into the cost of operating the bus will give the comparative relation, and also the amount of the contribution of the parents or guardians of the pupils using the bus and attending a private school.

In your letter you ask if contribution must be made for students attending a private school if there is no increase in the cost to the district due to the fact such students receive transportation. Section 8 of Chapter 152, Montana Session Laws of 1941, is specific in requiring that permission from the Clerk of the District must be secured and "the parents or guardian of the child shall pay their proportionate share of the cost of such transportation." If the payments so made are not immediately available for use because of a lack of an appropriation in the transportation budget, then such funds may be used in the transportation budget for the next fiscal year.

It is therefore, my opinion that the payment for transportation to be made by the parents or guardian of a student attending a private or parochial school may be determined by dividing the total number of students using the bus, including those attending the private or parochial school, into the cost of operating the bus as fixed by the current transportation budget.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 135 - 1950

Held: 1. When a School Board closes a school in a school district the Board is not required to furnish actual transportation by bus or rail, but rather may pay to the parent or guardian the cost of transportation in accordance with the schedule of payments provided by law.

2. Sections 75-2901, and 75-2906, Revised Codes of Montana, 1947, provide a procedure for compelling a parent to send children within the school age to school.

November 24, 1950

Mr. Roy W. Holmes
County Attorney
Carter County
Ekalaka, Montana

Dear Mr. Holmes:

You have requested my opinion on the following questions on behalf of the County Superintendent of Schools for your County.

1. May the Board of Trustees of a school district close a school in a district and merely pay the parents of pupils for transporting the pupils to another school, or must the trustees furnish actual transportation by bus or other vehicle?

2. How may a parent who refuses to send his children to school be forced to do so?

Section 75-3404, Revised Codes of Montana, 1947, was originally enacted as Section 4, Chapter 152, Session Laws of 1941, and provides in part as follows:

> "The Board of Trustees shall have the power to close any elementary school within the district, and transport the pupils to another school or schools within that district, when the Board deems such act to be for the best interests of all the pupils attending school..."

It is clear that the Board of Trustees may close a school in a district, and the question then arises as to what is meant by the word "transport" in the above section.

Section 75-3402, R.C.M., 1947, which was enacted as Section 2 of Chapter 152, Session Laws of 1941, defines what is meant by the term "transportation" as that term is used in Chapter 152, of the Laws of 1941. This section provides:

> "Unless a different meaning is plainly required by the context, 'transportation' shall in this act, mean (1) the actual transporting of pupils who live three (3) or more miles distant from a public school, by bus, rail or otherwise; (2) the providing of any services whereby the school board is relieved of actually transporting such pupils, such as paying parent or guardian for transportation, paying rent or board or any part thereof and providing supervised correspondence study or supervised home study."

The context of Section 75-3404, supra, clearly indicates that the word "transport" as used therein is defined by Section 75-3402, supra. Therefore, it is my opinion that if the Board of Trustees of a school district closes a school it may pay the parent or guardian in accordance with the schedule set forth in Section 75-3407, R.C.M., 1947, as amended by Chapter 200, Session Laws of 1949, and need not provide actual transportation by bus, rail, or otherwise. The purpose of giving the term"transportation" a dual meaning in Chapter 152, Session

Laws of 1941, was to allow a School Board to exercise its discretion and provide for payment to parents for transportation when circumstances were not such as to warrant the supplying of actual transportation facilities by the school district.

Section 75-2901 to 75-2906, inclusive, make it compulsory that children between the ages of eight and sixteen years of age be sent to a school in which the basic language taught is English. Section 75-2901, as amended by Chapter 61, Session Laws of 1949, provides in part as follows:

> "...Any parent, guardian or other person having the care and custody of a child between the ages of eight (8) and sixteen (16) years, who shall fail to comply with the provisions of this section, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not less than five dollars ($5.00) nor more than twenty dollars (20.00)"

Thus, a parent who refuses to send his child to school may be found guilty of committing a misdemeanor, and subject to a fine.

However, I believe that Section 75-2905, R.C.M., 1947, which provides an alternate procedure in lieu of a fine is perhaps a more effective procedure to compel a parent to send his child to school. This section provides that the truant officer may notify the parent in writing of the nonattendance of his child and of the consequences of continued nonattendance, and requires the parent to cause the child to attend school within two days from the date of the notice. The statute

then provides as follows:

> "Upon failure to do so, the truant officer shall make complaint against the parent, guardian, or other person in charge of the child, in any court of competent jurisdiction in the district in which the offense occurs for such failure, and upon such conviction, the parent, guardian or other person in charge shall be fined not less than five dollars nor more than twenty dollars; or the court may in its discretion, require the person so convicted to give bond in the penal sum of one hundred dollars, with sureties, to the approval of the court, conditioned that he or she will cause the child under his or her charge to attend some recognized school within two days thereafter and to remain at such school during the term prescribed by law; and upon failure or refusal of any parent, guardian, or other person to pay said fine and costs, or furnish said bond, according to the order of the court then said parent, guardian or other person shall be imprisoned in the County jail not less than ten days nor more than thirty days."

Thus, through the institution of court proceedings may the County Superintendent coerce parents into sending their children to school, providing that the children are within the school age.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 85 - 1952

Held: 1. It is the duty of the board of trustees of a third class district to request the county superintendent of schools to call an election submitting the question of annexation when a petition signed by twenty per cent of the qualified electors of the school district has been presented to the board of trustees of such third class district. 2. Upon the complaint being made to the county transportation committee such committee has the authority to fix bus routes and to order one school district to discontinue transporting resident elementary pupils of another district who have not been granted permission to attend school in a district other than that of residence.

May 19, 1952

Mr. Charles B. Sande
County Attorney
Yellowstone County
Billings, Montana

Attention: Mr. Arnold A. Berger, Deputy

Dear Mr. Sande:

You have requested my opinion as to whether it is the duty of trustees of a third class school district, which has received a petition signed by twenty per cent of the qualified electors of the district to a second or first class district. You have also asked if the county transportation committee may fix bus routes and prevent one school district from picking up elementary

children of another district and transport them in the high school bus to the district operating the bus.

In answering your first question it is necessary to consider the provisions of Section 75-1813, R.C.M., 1947, as amended by Chapter 32, Laws of 1951, which defines the procedure for the consolidation of school districts. Subdivision 5 of Section 75-1813, R.C.M., 1947, as amended, is pertinent to your question and reads in part as follows:

> "When, in the interest of reducing the cost of operation or improving the school service for pupils, a board of trustees, of a third class district, shall by a majority vote of its members or at the request of twenty per cent (20%) of the qualified electors of the districts indicated by a petition, ask the county superintendent of schools to annex the territory and property of such third class district to any second or first class district, the county superintendent shall, upon an approving vote of the trustees of the district with which the annexation is sought, authorize an election on such annexation within not less than twenty (20) nor more than thirty (30) days."

The above quoted fixes two methods for requesting the county superintendent to call an election. The first is by a majority vote of the board of trustees and the second by a petition addressed to the board of trustees of twenty per cent of the qualified electors of the district seeking to be annexed to a first or second class district. In both instances the trustees of the district with which annexation is sought must consent and then it is the duty of the county superintendent to call an election. Under the facts you presented it appears

that twenty per cent of the qualified electors petitioned trustees of their district to request that the county superintendent call an election and that the trustees have failed to make such a request.

It is to be noted that the above section states " a board of trustees... shall... at the request of twenty per cent of the qualified electors...ask the county superintendent of schools to annex... such third class district to any second or first class district." The duty imposed is mandatory and does not permit the trustees to exercise any discretion. If the trustees do not present the petition to the county superintendent, then they would be guilty of violation of a clear legal duty and a mandamus action will lie. Section 93-9102, R.C.M., 1947, provides that a writ of mandamus may be issued by a court "to compel the performance of an act which the law specially enjoins as a duty resulting from an office." State ex rel. Peterson v. Peck, 91 Mont. 5, 4 Pac. (2d) 1086. In State v. McCracken, 91 Mont. 157, 6 Pac. (2d) 869, the court said, "Mandamus is a proper remedy to compel the performance of a ministerial act or duty." The presentation of the request to your county superintendent to hold the election would certainly be a ministerial duty and should be performed by the trustees.

While no time is fixed by the statute for the trustees to

request that the county superintendent call an election, it must be assumed that the trustees must perform the act within a reasonable time as the delay might well defeat the purpose of the statute. State ex rel. Venek v. Justice Court, 110 Mont. 550, 104 Pac. (2d) 14.

It is therefore my opinion that it is the duty of the board of trustees of a third class district to request the county superintendent of schools to call an election submitting the question of annexation when a petition signed by a twenty per cent of the qualified electors of the school district has been presented to the board of trustees of such third class district.

Your second question is concerned with the duties and powers of the county transportation committee. The county transportation committee was first authorized by Chapter 189, Laws of 1951, which amended Section 75-3412, R.C.M., 1947. The committee was granted broad powers as the statute provides:

> "It shall be the duty of the county transportation committee to approve bus routes and applications for increased transportation payments, and to act in all controversies resulting from transportation matters."

All bus routes are subject to the approval of the transportation committee and any variance in route from the approved route would raise a controversy within the meaning of the above quoted section within the jurisdiction of the committee.

Picking up elementary school children in one district and

transporting them to the district operating the bus is contrary to Section 75-3401, R.C.M., 1947, as amended by Chapter 189, Laws of 1951, if such children were not authorized to attend the schools of the district operating the bus. The prohibition is found in Section 75-3401, as amended, which reads in part as follows:

> "The board of trustees of any school district ...may furnish transportation to and from school for all pupils residing within their district, who are enrolled in the public schools of their district, or who have been granted permission to attend a school in another district...."

Permission to attend school in a district other than the residence of a child must be given in the manner and as provided in Section 75-1630, R.C.M., 1947, as amended by Chapter 207, Laws of 1951.

It is therefore my opinion that upon complaint being made to the county transportation committee such committee has the authority to fix bus routes and to order one school district to discontinue transporting resident elementary pupils of another district who have not been granted permission to attend school in a district other than that of residence.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 68 - 1954

Held: 1. Transportation by a school district of children to another district for a school term of six months complied with the statute prior to July 1, 1951, and subsequently, the term of school for such children was fixed at 180 days. Compliance with these standards would preclude the district from being declared abandoned.

2. It is within the discretionary powers of school trustees to require a cash deposit by children to cover breakage and excessive us of supplies in the course designated in Section 75-4232, R.C.M., 1947.

March 30, 1954

Mr. Henry I. Grant., Jr.
County Attorney
Stillwater County
Columbus, Montana

Dear Mr. Grant:

You have requested my opinion concerning the length of time for each school year that transportation of children by one district to another school must be furnished to preclude abandonment of the district.

You have also asked if school trustees may require a cash deposit to cover breakage and excessive use of supplies.

In answering your first question, it is important to consider Section 75-1522, R.C.M., 1947, Prior to amendment, Section 75-1522 supra, provided that transportation of all children "to another district for the purpose of attending school

therein for a term of at least six (6) months during each of such three (3) years" will preclude the necessity of declaring a school district abandoned. The amendment to this Section by Chapter 109, Laws of 1951, fixed the term of the school year for a period of "at least one hundred eighty (180) days each year."

The precise problem is whether the 180 days provision of the amendment applies to each of the preceding three years. If such a construction were given to the amendment, then a retroactive effect would be given to this new statute. However, Section 12-201, R.C.M., 1947 reads as follows:

> "No law contained in any of the codes or other statutes of Montana is retroactive unless expressly so declared."

Our Supreme Court, in Educational Bonds Case, 68 Mont 526, 219 Pac. 637, held:

> "There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retroactive operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against a retroactive operation of a statute."

In view of the above presumption and the lack of clear expression that the amendment is to operate retroactively, it must be concluded that the 180 day requirement was applicable on July 1, 1951, the effective date of Chapter 109, Laws of 1951. The test for any school year prior to the amendment is a term of at least six months. A school month is defined for

teacher's contracts by Section 75-2202, R.C.M., 1947, as "twenty school days, or four weeks of five days each" and such definition should be applied to the statute under consideration.

Your second question is answered by Section 75-4232, R.C.M., 1947, which states:

> "The board of trustees of any school district or county high school may require pupils in the commercial, industrial arts, music, domestic science, scientific or agricultural courses to pay reasonable fees to cover the actual cost of breakage and of excessive supplies used."

This section contemplates reimbursement by the pupils in the designated courses for breakage and unusual use of supplies. No precise method of assessing the fees is fixed thereof by the statute and any reasonable method will suffice. Section 75-1632, R.C.M., 1947 as last amended by Chapter 233, Laws of 1953, enumerates the duties of school trustees, one of which is:

> "To prescribe and enforce rules not inconsistent with law, or those prescribed by the superintendent of public instruction for their own government of schools under their supervision."

This gives wide discretionary powers to the trustees and is in accord with the general law. See: Whittaker vs. Salem, 216 Mass. 483, 104 N.E. 359, and Brooks vs. Shannon, 184 Okla. 255, 86 Pac. (2d) 792.

It is therefore my opinion that:

1. Transportation by a school district of children to another district for a school term of six months complied with

the statute prior to July 1, 1951, and subsequently, the term of school for such children was fixed at 180 days. Compliance with these standards would preclude the district from being declared abandoned.

2. It is within the discretionary powers of school trustees to require a cash deposit by children to cover breakage and excessive use of supplies in the courses designated in Section 75-4232, R.C.M., 1947.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 80 - 1954

Held: High School students may not be counted in computing the average number of children transported by any school district so as to preclude the district being declared abandoned under the provisions of Section 75-1522, R.C.M., 1947, as amended by Chapter 109, Laws of 1951.

June 28, 1954

Mr. Paul J. Murphy
County Attorney
Judith Basin County
Stanford, Montana

Dear Mr. Murphy:

You have requested my opinion whether a school district in counting children transported may include high school children so as to avoid the abandonment of the district. You advised me that if the high school students of a district are included in the number of children transported in each of the last three years, then an average of more than five children will have received transportation.

Section 75-1522, R.C.M., 1947, as amended by Chapter 109, Laws of 1951, states that a county superintendent must declare a school district abandoned when a school has not been operated in the district during a period of three consecutive years. Such abandonment may be avoided if the school district comes within the exception found in Section 75-1522, supra, which reads as follows:

> "...that if any such school district has provided transportation either by bus or by the payment to individuals, or has provided payments for board and room in lieu of transportation for an average of at least five (5) children of school age, during a period of three (3) consecutive years living within the district, to another district for the purpose of attending school therein for a term of at least one hundred eighty (180) days each year. Such transportation shall be deemed equivalent to the actual holding of school in such district for a term of one hundred eighty (180) days in each year, and such district shall not be fordered abandoned."

It is to be noted that the above-quoted portion of the statute contemplates the furnishing of transportation by the school district. An examination of Section 75-3414, R.C.M., 1947, as amended by Chapter 189, Laws of 1951, makes it the duty of the Board of Trustees of every school district maintaining a high school and the Board of Trustees of every county high school to provide a transportation budget. The sources of the funds for this budget are the State of Montana and a county-wide tax levy. One third of the funds are received from the state and two thirds from the county levy. The money from these two sources is limited in amount by the schedule set forth in Section 75-3407, R.C.M., 1947, as last amended by Chapter 189, Laws of 1951. A greater amount may be included in the budget by a special levy either on the high school district, the county, or the school district in a priority fixed by the statute. In no event is a levy made for the transportation of high school students on a school district as such where such school district does not maintain a high school. The conclusion

must then be reached that a school district does not directly provide transportation to high school students within the meaning of Section 75-1522, supra, so that high school students can properly be included in the number transported so as to preclude the abandonment of the school district.

In construing Section 75-1522, supra, as amended, the whole section should be considered in determining the legislative intent. In State vs. District Court, 51, Mont. 305, 152, Pac. 745, the court said:

> "The words, phrases and sentences of a statute are to be understood as used, not in any abstract sense but with due regard to the context, and in that sense which best harmonizes with all other parts of the statute."

In applying the above-quoted rule, it is apparent that this code section is concerned only with elementary schools. Subsection 2 of Section 75-1522, supra, states, in part, as follows:

> "Whenever there are five (5) or more children in abandoned territory eligible for attendance in an elementary school as determined by the county superintendent and residing more than three (3) miles from an established school in the district to which the abandoned territory is attached, the school trustees shall provide a school in such abandoned territory when requested so to do by the parents of at least three (3) of such children."

The fact that the residence of five or more elementary school students in the area makes it the duty of the trustees to open a school, leads to the conslusion that elementary school students alone constitute the test for determining the necessity

of operating the school and fixes the meaning of the five children referred to in Subsection 1 of this act as elementary school children.

The right to attend a high school by a resident of a county is not dependent on domicile in any particular school district since Section 75-4228, R.C.M., 1947, provides:

> "Attendance at any accredited high school shall be free to all eligible high school pupils residing in the county wherein such accredited high school is located except for such fees as the board of trustees are otherwise specially authorized by law to exact."

As was pointed out above, transportation for high school students is not furnished by any school district but is an obligation of the county and state without regard to any particular school district. It must be concluded that if a school district does not directly pay for the transportation of high school students, then a school district does not "provide transportation" within the meaning of Section 75-1522. Also, the right to attend any high school in the county is given to every student of the county without regard to residence in any particular school district.

It is therefore my opinion that high school students may not be counted in computing the average number of children transported by any school district so as to precludethe district being declared abandoned under the provisions of Section 75-1522, R.C.M., 1947, as amended by Chapter 109, Laws of 1951.

Very truly yours,
ARNOLD H. OLSEN
Attorney General

CHAPTER REFERENCES

The following official opinions of the attorney general can be found in Volume 21 of the Report and Official Opinions of the Attorney General.

Opinion 120 - 1946
Opinion 186 - 1946

The following official opinions of the attorney general can be found in Volume 22 of the Report and Official Opinions of the Attorney General.

Opinion 57 - 1947
Opinion 60 - 1947

The following official opinions of the attorney general can be found in Volume 23 of the Report and Official Opinions of the Attorney General.

Opinion 13 - 1949
Opinion 57 - 1949
Opinion 84 - 1950
Opinion 135 - 1950

The following official opinions of the attorney general can be found in Volume 24 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 85 - 1952

The following official opinions of the attorney general can be found in Volume 25 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 68 - 1954
Opinion 80 - 1954

CHAPTER XI

CONSOLIDATION

Opinion 130 - 1946

Held: School district may be consolidated with an existing joint school district only by the creation of a new joint school district in compliance with the provisions of Section 1024 and 1035, R.C.M., 1935, as amended.

February 26, 1946

Mr. W. L. Hyde
County Attorney
Mineral County
Superior, Montana

Dear Mr. Hyde:

You have requested my opinion concerning the consolidation of a joint school district with two school districts. You advise me that two school districts in Missoula County are adjacent to a joint school district and that you would like to know what procedure to follow?

Section 1034, R.C.M., 1935, as amended by Chapter 201, Laws of 1943, provides for the consolidation of a school district. The section provides in part:

> "Two or more adjacent school districts lying in one county may be consolidated..."

The above quoted precludes the possibility of proceeding under Section 1034, as amended, as the joint school district of necessity lies in two counties.

Section 1035, R.C.M., 1935, provides for the creation of

joint school districts, but is not complete in itself insofar as it does not set out the procedure to be followed. However, it declares joint districts "may be formed in the same manner as other new districts."

The case of State v. Lensman, 108 Mont. 118, 88 Pac. (2d) 63, considered the method of creating a joint school district and held that Section 1024 and 1035, R.C.M., 1935, were the applicable statutes. It should be noted that the above case involved the creation of a new joint district from a portion of an old joint district and is therefore an analogous situation to the one presented here.

Section 1024, R.C.M., 1935, as amended by Chapter 61, Laws of 1943, defines the procedure to be followed as does Opinion No. 396, Volume 19, Report and Official Opinions of the Attorney General. Reference is made to Opinion No. 396 for the discussion of the problem which should be helpful. As you will note Section 1023, R.C.M., 1935, precludes the creation of a new district between March 1 and July 1 of any calendar year.

It is therefore my opinion that school districts may be consolidated with an existing joint school district only by the creation of a new joint school district in compliance with the provisions of Section 1024 and 1035, R.C.M., 1935, as amended.

Sincerely yours,
R. V. BOTTOMLY
Attorney General

Opinion 147 - 1946

Held: When two or more school district are consolidated, and a new district is formed, the county superintendent of schools must appoint three trustees to serve until the first Saturday in April succeeding. In the case of consolidation by annexation, the officers of the first or second class school district shall continue to hold office until the end of the term for which they were elected.

April 26, 1946

Mr. M.L. Parcells
County Attorney
Stillwater County
Columbus, Montana

Dear Mr. Parcells:

You have requested my opinion concerning the appointment of school trustees for a consolidated school district.

Section 1034, R.C.M., 1935, as amended by Chapter 201, Laws of 1943, provides in part:

> "Two or more adjacent school districts lying in one county may be consolidated either by the formation of a new district, or by the annexation of one or more districts to an existing district..."

It is apparent from the above quoted that the consolidation results in a new district; annexation results in the extinguishment of one district by its incorporation into another, which district continues to function as an enlarged district.

If the proper steps are followed for consolidation of two districts, and the vote of the trustees and of the electors,

if an election is held, is favorable, the county superintendent "shall effect the consolidation of such districts" by an order and "shall appoint three (3) trustees to serve until the first Saturday in April succeeding." At the next annual school election trustees are regularly elected. The trustees of the discontinued districts relinquish their offices, together with the records, funds, and effects of the old districts to the officers of the new district.

Annexation occurs when a third class district is merged into an adjacent second or first class district. The officers of the annexed districts turn over to the officers of the district to which they are annexed all records, funds, and effects. The act then provides:

> "The officers of the first or second class district involved shall continue to hold office under the consolidated district until the end of the terms for which they were duly elected and their successors shall be regularly elected as provided by law."

The provision for annexation has application only when a third class district becomes merged with a first or second class district. Consolidation occurs in all other situations when two or more districts are combined.

It is therefore my opinion:

1. When two or more school districts are consolidated and a new district is formed, the county superintendent of schools must appoint three trustees to serve until the first

Saturday in April succeeding.

2. In the case of consolidation by annexation, the officers of the first or second class school district shall continue to hold office until the end of the term for which they were elected.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 84 - 1947

Held: In conformity with the law as given to us by our legislature, in an election, on the consolidation of school districts, voters in the district which would assume an indebtedness by reason of consolidation must have the qualifications set out in Section 1002, R.C.M., 1935, as amended by Chapter 65, Laws of 1941, and also the qualifications required by Section 5199.1, R.C.M., 1935. Thus, in addition to the requirements of Section 1002, R.C.M., as amended, the voters in such district must be registered and their names must appear on the last preceding assessment roll. In districts not assuming an indebtedness, the voter need only have the qualifications under Section 1002, R.C.M., 1935. In other words, when no indebtedness is assumed the voter need not be a taxpayer, or registered voter.

December 11, 1947

Mr. Truman Bradford
County Attorney
Cascade County
Great Falls, Montana

Attention: Mr. W. H. Swanberg, Deputy County Attorney

Dear Mr. Bradford:

You have requested an opinion of this office concerning the qualifications of electors at an election on the question of consolidation, of two third class school districts. You advise me that one of the districts has a bonded indebtedness.

Section 1034, R.C.M., 1935, as amended by Chapter 201,

Laws of 1943, authorizes consolidation of school districts by the county superintendent of schools after an approving vote of the board of trustees of each district. However, such consolidation cannot be made if twenty per cent of the qualified electors of any one of the districts, or more petition for an election in their district on the question, until after a favorable vote on the question.

In Opinion No. 384, Volume 19, Report and Official Opinions of the Attorney General, it was held that electors who satisfy the requirements of Section 1002, R.C.M., 1935, as amended, are eligible to vote at an election for the consolidation of school districts. The opinion did not consider the problem where one district had bonded indebtedness as is the situation here.

Section 1034, R.C.M., 1935, as amended by Chapter 201, Laws of 1943, provides in part:

> "Bonded indebtedness of any districts merged by consolidation or annexation shall be assumed by the consolidated district or the district to which another is annexed."

It is apparent that if the bonded indebtedness is assumed by the consolidated district then a district without any indebtedness, in becoming a part of a new district would be assuming a debt or liability in proportion to its assessed valuation.

Section 2 of Article IV of the Montana Constitution provides:

> "If the question submitted concerns the creation of any levy, debt or liability the person,..... must also be a taxpayer whose name appears upon the last preceding completed assessment roll, in order to entitle him to vote upon such question."

The qualifications for voting upon the creation or increasing of indebtedness is covered by Section 5199.1 R.C.M., 1935, which reads:

> "That from and after the passage and approval of this act, only such registered electors of the city, town, school district, or other municipal corporation whose names appear upon the last preceding assessment roll shall be entitled to vote upon any proposal to create or increase any indebtedness of city, town, school district or other municipal corporation, required by law to be submitted to a vote of the electors thereof."

Our Supreme Court in Weber v. City of Helena, 89 Mont, 109, 297 Pac. 455, said in regard to this section:

> "We think the evident purpose of the Act was to provide the procedure for all elections to increase or create the indebtedness of the political units therein mentioned whenever the laws required the approval of electors..."

In a district which has indebtedness, but assumes no new indebtedness, electors who meet the requirements of Section 1002, R.C.M., 1935 as amended by Chapter 65, Laws of 1941, could vote on the question of consolidation. This would result in different qualifications in the elections held in the two districts.

It is, therefore, my opinion, in conformity with the law as given to us by our legislature, in an election, on the

consolidation of school districts, voters in the district which would assume an indebtedness by reason of consolidation must have the qualifications set out in Section 1002, R.C.M., 1935, as amended by Chapter 65, Laws of 1941, and also the qualifications required by Section 5199.1, R.C.M., 1935. Thus in addition to the requirements of Section 1002, R.C.M., as amended, the voters in such district must be registered and their names must appear on the last preceding assessment roll. In districts not assuming an indebtedness, the voter need only have the qualifications under Section 1002, R.C.M., 1935. In other words, when no indebtedness is assumed the voter need not be a taxpayer, or registered voter.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 150 - 1948

Held: Property located within school districts which are abandoned and annexed to an existing school district prior to the fixing of the levy for the latter district, shall be taxed at the same rate as all property within the then existing district, except in so far as prior indebtedness or outstanding bonds are involved.

November 30, 1948

Mr. James H. Higgins
County Attorney
Meagher County
White Sulphur Springs, Montana

Dear Mr. Higgins:

You have requested my opinion concerning the levy for tax purposes on property located within three abandoned school districts which were annexed to an existing school district.

You advise me that the order of abandonment and of annexation was made by the County Superintendent of Schools on July 26 and 28, 1948. You also state that residents within the territory which was annexed feel that the tax levy on their property should not be that of the district to which the abandoned school districts were annexed.

Chapter 168, Laws of 1943, authorizes the abandonment of school districts and it provides that all funds of an abandoned school district shall be placed in the general fund of the district to which its territory is attached. This means that the abandoned district has been so merged that there is but one

legal entity.

Also the levies for school districts are fixed after the preparation of the school budgets. Sections 1019.12 and 1263.19 R.C.M., 1935, provide that the Board of County Commissioners shall meet on the second Monday in August for the purpose of fixing tax levies. It is apparent that the annexed territory in question must be subject to the same tax levy fixed for the school district to which it is attached or otherwise escape liability for school taxes as school budgets cannot be made for abandoned school districts. All subsequent taxes on property located within the districts abandoned and annexed will likewise be at the same rate fixed for property within the district to which the abandoned territory is annexed, insofar as no prior indebtedness or outstanding bonds are involved.

It is therefore, my opinion that property located within school districts which are abandoned and annexed to an existing school district prior to the fixing of the levy for the latter shall be taxed at the same rate as all property within the then existing district, except as to the above mentioned prior indebtedness.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 42 - 1949

Held: (1) The territory of a Third Class School District which is annexed to a First or Second Class District does not assume any of the bonded indebtedness of the First or Second Class District; but the bonded indebtedness of the Third Class District is assumed by the First or Second Class District to which the Third Class District is annexed.

(2) If a Third Class School District, or any other Class District is consolidated with one or more School Districts and a new District formed, the bonded indebtedness of each of the component Districts is assumed by the new District and all of the territory of the new District is liable for the payment of such bonds.

July 30, 1949

Miss Mary M. Condon
State Superintendent of Public Instruction
Helena, Montana

Dear Miss Condon:

You have submitted for my opinion the following question:

> "Does a Third Class District which has been annexed to a second or third class district assume a share of the latter's bonded indebtedness?"

In answering your question it is important to consider Section 1034, R.C.M., 1935, as amended by Chapter 201, Laws of 1943, which defines the procedure for the consolidation of School Districts and the annexation of one or more districts to an existing district. It is to be observed that under the

provisions of this Section, consolidation of two or more districts is effected by the merger of the districts after appropriate action of the trustees of the districts concerned, with the resulting formation of a new district. Annexation of a Third Class District occurs when the district is merged with a First or Second Class District, There is no provision in the Section for annexation of a Third Class District to a Third Class District as your question suggests. This interpretation of Section 1034, as amended, was recognized in the Opinion No. 147, Volume 21, Report and Official Opinions of the Attorney General wherein it was said:

> "The provision for annexation has application only when a Third Class District becomes merged with a First or Second Class District. Consolidation occurs in all other situations when two or more districts are combined."

The portion of Section 1034, as amended which applies to the bonded indebtedness reads as follows:

> "Bonded indebtedness of any districts merged by consolidation or annexation shall be assumed by the consolidated district or the district to which another is annexed."

The above quoted statute contemplates two situations. The assumption of the bonded indebtedness of the component parts of the new district resulting by consolidation of two or more districts and the assumption by a First or Second Class District of the bonded indebtedness of a Third Class District which is annexed. In the case of consolidation, a Third Class District

which is included within the new district would assume its proportionate share of the bonded indebtedness of the new district, but in the event of annexation of a Third Class District to a First or Second Class District no provision is made for such assumption.

Section 1029.1, R.C.M., 1935, which was amended by implication by Chapter 201, Laws of 1943, provided that the bonded indebtedness of a school district which is consolidated or whose boundaries are changed shall remain the indebtedness of the original territory against which the bonds were issued. Chapter 201 did not alter this rule in regard to Third Class Districts annexed to First or Second Class Districts and as a consequence such Third Class Districts so annexed would not assume the indebtedness of the districts to which the Third Class Districts are annexed.

The foregoing does not apply to school districts which have been declared abandoned under the provisions of Section 970, R.C.M., 1935, as amended by Chapter 168, Laws of 1943, as such abandoned districts may be attached to one or more contiguous districts on the order of the County Superintendent and do not constitute annexation as is contemplated by your question. The territory of the abandoned district which is attached will continue, under Chapter 168, to be liable for its bonded indebtedness and there is no assumption of indebtedness by the district to which it is attached.

It is therefore, my opinion that the territory of a Third Class District which is annexed to a First or Second Class District does not assume any of the bonded indebtedness of the First or Second Class Districts, but the bonded indebtedness of the Third Class District is assumed by the First or Second Class District to which the Third Class District is annexed.

It is also my opinion that if a Third Class District, or any class district, is consolidated with one or more school districts and a new district is formed the bonded indebtedness of each of the component districts is assumed by the new district and all of the territory of the new district, including that of the Third Class District, is liable for the payment of such bonds.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 50 - 1949

Held: 1. Territory in a School District may be transferred to an adjoining School District even though the territory to be transferred is within three miles of a school house in which school has not been held for the last four years.

2. The prohibition of Chapter 61, Laws of 1943, against transferring territory within three miles of a school refers to an established school and in my opinion a school house wherein school has not been held for the past four years is not an established school.

September 7, 1949

Mr. G.C. Schmidt, Jr.
County Attorney
Fort Benton, Montana

Dear Mr. Schmidt:

You have requested my opinion concerning the transfer of territory in one school district to an adjoining school district when the territory to be transferred is within three miles of a school house in which school has not been held for the last four years.

Section 1024, R.C.M., 1935, as amended by Chapter 61, Laws of 1943, provides in part:

> "A majority of the resident taxpayers who are registered electors and whose names appear upon the last completed assessment roll for state, county and school district taxes, residing in territory which is a part of any organized school district may present a petition in writing to the County Superintendent

> of Schools, asking that such territory be transferred to, or included in, any other organized district to which said territory is contiguous, provided however, that no territory within three (3) miles of an established school in such district shall be so transferred and provided further that the taxable valuation (the percentage valuation upon which levies are made and taxes computed) of property in the district from which territory is taken shall not be reduced to less than seventy-five thousand dollars ($75,000.00)."

The above quoted section prohibits the transfer of territory from one district to an adjoining district when such territory is within three miles of "an established school." The territory in question may be transferred to the adjoining district if "an established school" means one that is used and in operation as a school rather than an unused school house. The first portion of Section 1024, as amended, provides that the same three mile limitation applies to "any school house... in which a school is maintained," upon a petition to create a new district out of one or more existing districts. It is reasonable to assume that the legislature would not impose a different condition upon the creation of a new district than upon transfer of territory from one district to another. Uniformity in applying the limitation would result in carrying out the purpose of the statute. Such a construction of the statute is in accord with the rule found in State v. Millis, 81 Mont. 86, 261 Pac. 885, wherein our Supreme Court said "Statutes are to be construed so as best to effectuate the object of the legislature."

It is therefore my opinion that under the provision of Section 1024, R.C.M., 1935, as amended by Chapter 61, Laws of 1943, the territory which ispart of an organized school district and within three miles of a school house which has not been used for school purposes in four years may be transferred to an adjoining school district provided that the other conditions of the statute are met.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 128 - 1950

Held: 1. High School Building Districts may be consolidated by virtue of Section 1, Chapter 130, Laws of 1949, and the procedure to be followed is found in Section 75-4602, R.C.M., 1947.

2. Surplus funds realized from the sale of a high school constructed with the proceeds of bonds issued by a High School Building District should be allocated to the component elementary school districts of the High School Building District if a high school is no longer operated within the High School Building District and the subsequent consolidation of the High School Building District would not affect such distribution.

September 30, 1950

Mr. Robert E. Purcell
County Attorney
Garfield County
Jordan, Montana

Dear Mr. Purcell:

You have requested my opinion concerning the procedure to be followed in consolidating two High School Building Districts.

Also, you have asked what disposition should be made of the surplus remaining after the payment of debts realized from the sale of a high school building and dormitory which were constructed from funds from a bond issue of a High School Building District.

In answering your first question, it is necessary to

consider Section 1, Chapter 130, Laws of 1949, which reads as follows:

> "In any County which has been divided into High School Building Districts, at the request of any High School Board of Trustees, the commission, provided for in Chapter 275, Laws of 1947, may, in accord with the procedure provided in said chapter, alter the boundaries of said districts or re-divide the County into a different number of high school districts, provided that such alteration or redivision may not be done within three years from the original division or the last alteration of boundaries and last redivision."

The above quoted portion of Chapter 130 grants the authority for the redivision of a County into a different number of high school districts. Section 75-4602, R.C.M., 1947, which was formerly Section 2 of Chapter 275, Laws of 1947, fixes the manner of dividing a County into High School Building Districts which procedure can be used for any subsequent alteration of bounderies of high school districts.

In Opinion No. 121, Volume 17, Report and Official Opinions of the Attorney General, this office held that the only statutory method of consolidation of high school districts was to be found in Section 1034, R.C.M., 1935, which is now Section 75-1813, R.C.M., 1947. However, the holding in that Opinion no longer has application due to the enactment of Chapter 130, Laws of 1949, which specifically deals with the manner of redividing a County or altering the boundaries of high school districts. In the case of Langston v. Currie 95 Mont 57, 26 Pac. (2d) 160, the court said:

> "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent Legislative policy, but, to the extent of any necessary repugnance between them, the special will prevail over the general."

Your second question is not answered by any specific statutory provision. The disposition of funds realized from the sale of a County High School is covered by Section 75-4127, R.C.M., 1947, and the distribution of remaining funds of an abandoned school district is allocated under Section 75-1522, R.C.M., 1947. In the case of State v. Branderburg, 107 Mont. 199, 82 Pac. (2d) 593, the distribution of funds realized from the sale of an obsolete building which had been acquired for the use of the County High School was made to the County High School account. The reasoning in the case was based on the source of the money and the court held that the purchase money having come from the distributive share of the County-wide High School levy the proceeds of the sale of the building should be the property of the County High School. Applying the reasoning of that case to the facts presented here the conclusion must be reached that the funds realized from the sale of the building should be distributed to the general funds of the elementary schools comprising the High School Building District as it was the area within the High School Districts which paid off the bond issue. However, the obligations and debts of the High School District must be first paid, before

distribution of any surplus to the component elementary districts.

It is therefore my opinion:

1. High School Building Districts may be consolidated by virtue of Section 1, Chapter 130, Laws of 1949, and the procedure to be followed is found in Section 75-4602, R.C.M., 1947.

2. Surplus funds realized from the sale of a High School constructed with the proceeds of bonds issued by a High School Building District should be allocated to the component elementary school districts of the High School Building District if a high school is no longer operated within the High School Building Districts and the subsequent consolidation of the High School Building District would not effect such distribution.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 66 - 1954

Held: An appeal may be taken to the board of county commissioners from an order of the county superintendent of schools denying the petition requesting the transfer of territory from one school district to another under the provisions of Subsection 7 of Section 75-1805, R.C.M., 1947.

March 29, 1954

Mr. Russell K. Fillner
County Attorney
Rosebud County
Forsyth, Montana

Dear Mr. Fillner:

You have requested my opinion concerning the right of appeal to the board of county commissioners from the decision of the county superintendent under Subsection 7 of Section 75-1805, R.C.M., 1947. You advise me that a petition to transfer territory from one school district to another was presented to the county superintendent who, after a hearing, denied the petition and an appeal was taken to the board of county commissioners by the petitioners.

Subsection 7 of Section 75-1805, R.C.M., 1947, provides that the county superintendent, after receiving a petition to transfer territory, shall:

> "...proceed to hear such petition, and if he deem it advisable and for the best interest of the territory proposed to be transferred or included, he shall grant such petition and make an order fixing the boundaries of the district so changed, which order

> shall be final, unless an appeal be taken to the board of county commissioners of the county wherein such districts are located within thirty (30) days thereafter, and upon hearing thereof the decision of said board shall be final."

The above quoted portion of the statue does not state in precise language that an appeal may be had when the petition is denied. However, the statute states that if the petition is granted, the county superintendent must make "an order fixing the boundaries of the district so changed." Such an order calls for statutory directions, while an order denying the petition need not be defined. To authorize an appeal when the petition is granted and to prohibit an appeal on the denial of the petition would not be justified and would not appear to be the legislative intention. The right of appeal to the board of county commissioners and the powers of the board were broadly construed in the case of Read vs. Stephens, 121 Mont. 508, broadly construed in the case of Read vs. Stephens, 121 Mont. 508, 193 Pac. (2d) 626. The court in rendering its opinion did not question the right of appeal from an order of the county superintendent denying the petition and recognized the broad powers of both the county superintendent and the board of county commissioners in the following language.

> "...the legislature has delegated to the county superintendent of schools and to the board of county commissioners a full measure of discretionary power in creating and changing the boundaries of school districts."

> "When an appeal is taken to the board of county commissioners from the order and decision of the county superintendent of schools, this power and discretion is vested in the board, and upon hearing of the appeal, the statute declares that 'the decision of said board shall be final'."

It is therefore my opinion that an appeal may be taken to the board of county commissioners from an order of the county superintendent of schools denying a petition requesting the transfer of territory from one school district to another under the provisions of Subsection 7 of Section 75-1805, R.C.M., 1947.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 69 - 1954

Held: 1. It is the duty of the county superintendent to make every reasonable effort to ascertain the number of qualified electors in a school district in computing the requisite per cent of signers on a petition for annexation of a school district.

2. Under the facts submitted the petition requesting annexation of a school district had the requisite signatures and an election should have been called and the question submitted to the qualified electors.

March 31, 1954

Miss Mary M. Condon
Superintendent of Public Instruction
State Capitol Building
Helena, Montana

Dear Miss Condon:

You have requested my opinion concerning the sufficiency of a petition requesting the county superintendent of Flathead County to annex School District No. 1, a third class district, to District No. 6, a second class district. The petition was signed by 23 qualified electors, and attached to the petition is the certificate of the county superintendent which recites the method followed by the superintendent in ascertaining whether or not the petition was signed by 20 per cent of the qualified electors. The pertinent part of the certificate is as follows:

"Basis of Calculation

Number of voters in a 'contested' school trustee election as shown by official tally in 1952 election...78
Number of voters in a 'contested school trustee election as shown by official tally in 1953 election...67
Number of parents listed on 1953 census list.....68
Number of registered voters voting in last general election.....109
Number of registered voters as of now.....112
A number of people in the district were contacted as to probable number of eligible voters-highest estimate was110."

On these facts the superintendent concluded that the petition had a sufficient number of signatures and called an election. The total vote cast at the election was 115; 61 of whom voted for annexation and an appeal was taken to your office. The appellants, in support of their appeal, submitted twelve affidavits of persons who stated they were qualified electors and did not vote at the election. These affidavits raise the question as to the sufficiency of the petition. Emphasis must be placed on the dates of the various steps taken in regard to the proceedings. The petition was filed with the county superintendent on January 2, and on January 5, the superintendent acted on the petition by notifying the school boards of the petition. The election was held on February 4. The affidavits of electors submitted executed more than ten days after the election by the appellants recited that each affiant was qualified to vote at the election.

This opinion is confined to the sufficiency of the petition, as the appeal on the whole record submitted must be decided by you.

In answering your question as to the sufficiency of the petition it is important to consider several statutes. The authority and procedure for the annexation of a third class district to a first or second class district is found in Subsection 5 of Section 75-1813, R.C.M., 1947, as last amended by Chapter 23, Laws of 1953, which reads in part as follows;

> "(5) When, in the interest of reducing cost of operation or improving the school service for pupils, a board of trustees, of a third class district shall by majority vote of its members or at the request of twenty per cent (20) of the qualified electors of the districts indicated by a petition, ask the county superintendent of schools to annex the territory and property of such third class district in its entirety, or proportionately to any number of first or second class districts as the board resolution or petition requests, the county superintendent shall upon an approving vote of the trustees of the district with which the annexation is sought, authorize an election on such annexation within not less than twenty (20) nor more than thirty days..."

This code section permits two alternatives. Either a resolution of the board of trustees or a petition of 20 per cent of the qualified electors of the third class district were able to request that the county superintendent annex the third class district to a first or second class district. A petition directed to the county superintendent initiated the proceedings with which we are concerned.

Only qualified electors of the third class district were eligible to sign the petition and qualifications of electors are defined in Section 75-1618, R.C.M., 1947:

> "Qualifications of Electors. Every citizen of the United States of the age of twenty-one years or over who has resided in the state of Montana for one year, and thirty days in the school district next preceding the election, may vote thereat."

It is important to observe that registration is not a condition precedent to casting a vote at a school district election in a district of the third class. That registration is not a qualification to vote in a general school election was the conclusion reached in 22 Opinions of the Attorney General 158, No. 94. The Montana Supreme Court, in State ex rel. Lang vs. Furnish, 48 Mont. 28, 134 Pac. 297, expressed the rule in this language:

> "...It is a principle long established that registration is no part of the qualifications of an elector and adds nothing to them; it is merely a method of ascertaining who the qualified electors are, in order that abuses of the elective franchise may be guarded against..."

My reason for emphasizing that registration is not an essential element to vote at a school election is apparent when it is remembered that the county superintendent must determine whether a petition is signed by 20 per cent of the electors and no registration list is available as a standard in ascertaining the sufficiency of the number of signers. This perplexing problem was considered in the case of Swaim vs. Redeen, 101 Mont. 521, 55 Pac. (2d) 1, although there was a marked difference in the statute there considered, as the petition had to be "signed and acknowledged by a majority of the resident freeholders." The court held that the county

superintendent was justified in relying on the county records as "the freeholders of the district are the freeholders shown to be such by the county records." The opinion also stated

> "...We do not think it may be reasonably assumed that the superintendent shall personally contact each of the residents of the district and by direct inquiry determine whether such resident is a freeholder or not..."

The Swaim case was followed in State ex rel. Wilson vs. Musburger, 114 Mont. 175, 133 Pac. (2d) 586, and the court specifically stated the petition for consolidation of school districts is jurisdictional and it is the duty of the county superintendent to search all the county records including those of the clerk of the court in determining the freeholders. However, both of these cases must be distinguished from the facts which you presented, as there has been a change in the statute by amendment. No longer must thesigners be freeholders, but qualified electors for school elections are proper petitioners. As was previously pointed out, school electors need not be registered and as a consequence the county superintendent does not have the benefit of a fixed mathematical basis for her computation.

As the petition was filed January 2 and the election held February 4, more than thirty days elapsed between the two dates. The county superintendent acted on the petition January 5, and the sufficiency of the petition must be tested as of such date. This conclusion is in accord with the opinion in Swaim vs. Redeen,

supra, where the court said:

> "The petition was filed in the action at bar July 16, 1934. The order calling the election or directing that notices of election be posted was made between 1:30 and 2:30 P.M., July 25th. Some two hours thereafter, or at 3 o'clock P.M., the same day, the deeds heretofore mentioned were filed for record so that the number of resident freeholders was increased to the extent that the petition did not contain a majority of such freeholders at that time. The deeds were filed after the election had been ordered and came too late to alter the required number of signatures on the petition..."

No showing is made by appellants as to the exact number of electors on January 5, and it is conjectural whether there were more or less than 115 electors at the time the superintendent acted on the petition. Six different inquiries were made by the county superintendent as set out in the "Basis of Calculation" recited in full above, and in my opinion each of these was a real probative force in reaching the conclusion that twenty-three signers were sufficient. It is not reasonable to require the county superintendent to conduct a door to door census and this was recognized in the Swaim case.

The petition is questioned after the election and this makes the recent case of State ex rel. Graham vs. Board of Examiners, 125 Mont. 419, 239 Pac. (2d) 283, particularly applicable as the court in the case discussed attacks on an initiative petition. The opinion stated the rule:

> "...But after the people have voted on the measure and a great majority of the voters throughout the

> state have expressed their approval, the courts presume that the public interest was there and technical objections to the petition or its sufficiency are disregarded."

The delay in challenging the petition until after the election also mitigates against the appellants' position as it was held in Reid vs. Lincoln County, 46 Mont. 31, 125 Pac. 429:

> "...But the election should be held valid unless it appears that a sufficient number of legal voters to have changed the result were prevented from casting their ballots..."

No showing was made nor was the claim made that any elector was deprived of a chance to vote.

It is therefore my opinion that is is the duty of the county superintendent to make every reasonable effort to ascertain the number of qualified electors in a school district in computing the requisite per cent of signers on a petition for annexation of a school district.

It is also my opinion that under the facts submitted the petition requesting annexation of a school district had the requisite signatures and an election should have been called and the question submitted to the qualified electors.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

CHAPTER REFERENCES

The following official opinions of the attorney general can be found in Volume 21 of the Report and Official Opinions of the Attorney General.

Opinion 130 - 1946
Opinion 147 - 1946

The following official opinions of the attorney general can be found in Volume 22 of the Report and Official Opinions of the Attorney General.

Opinion 84 - 1947
Opinion 150 - 1948

The following official opinions of the attorney general can be found in Volume 23 of the Report and Official Opinions of the Attorney General.

Opinion 42 - 1949
Opinion 50 - 1949
Opinion 128 - 1950

The following official opinions of the attorney general can be found in Volume 25 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 66 - 1954
Opinion 69 - 1954

CHAPTER XII

SCHOOL SITES AND ABANDONED SCHOOL DISTRICTS

Opinion 3 - 1946

Held: 1. That the inclusion of a site for a high school gymnasium in the bond election ballot is surplusage and the location of the site must be determined as an independant matter.

2. That the preliminary work in the construction of a county high school gymnasium may be done by the county and funds realized from bonds used in such work.

December 27, 1946

Honorable Leon C. Olmstead
Senator from Sweet Grass County
Big Timber, Montana

Dear Senator Olmstead:

You have requested my opinion concerning the following: The ballot submitted in a bond election for the construction of a gymnasium for the county high school recited the purpose of the bond issue was the "constructing and erecting a high school gymnasium on Lots 6, 7, 8, 9, and 10 (or a portion thereof) of Block 27 in Boulder Addition No. 1 to the City of Big Timber, Montana."

1. You ask if the gymnasium may be constructed on the lots other than those described in the ballot.

2. You ask if the foundation may be constructed with the use of county machinery or if the whole building must be built by a contractor after bids are called for and the best bid accepted.

Your first question concerning the inclusion in the ballot

of the location of the building raises a serious problem. Section 4630.11 R.C.M., 1935, provides that "if bonds are sought to be issued for two (2) or more purposes, then separate ballots must be provided for each purpose." The location of the building is not a bonding proposition and therefore does not violate this section. However, the qualified electors for a county bond issue must be taxpayers --Section 4630.12, R.C.M., 1935, as amended by Chapter 138, Laws of 1939--while there is not the requirement of being a taxpayer for eligibility to vote on the question of the acquisition, sale or change of a site for a school building. Section 1262.83, R.C.M., Montana, 1935, as amended by Chapter 207, Laws of 1939, and Section 1002, R.C.M., 1935, as amended by Chapter 83, Laws of 1939, and Chapter 65, Laws of 1941.

The inclusion of the proposed site in the ballot for the bond issue does not invalidate the bond issue. In State v. School District 97, Mont 358, 34 Pac. (2d) 522, our Court considered a bond election at which the selection of a school site was also submitted. The Court said:

> "It will be observed that the site matter was submitted at the first election on a separate ballot and in a qualified manner...Did the submission of the question constitute fraudulent misrepresentation to the voters? We do not see how it could have done so. There is nothing in the record before us to support the allegation that anyone was influenced to vote for the bonds by reason of the site matter. There is no evidence that the submission of

> that subject even in the qualified manner affected the result."

While the site was incorporated in the ballot in your election, yet the reasoning of the above quoted case would apply and would in effect put the burden on the taxpayer who complains to show that there was a sufficient number who were misled.

Also the lots described are a portion of the present high school site and are owned by the county. Without question the board has the authority to construct the building on a portion of the high school site. The fact the description of lots which are a portion of the high school site was included in the ballot makes one of the conclusions expressed in Morse v. Granite County, 44 Mont. 78, 119 Pac. 286, pertinent:

> "That the electors have been asked to give their consent to things which the board may or must do without such consent, may not be held to restrict the discretion lodged in it by statute."

If the lots in question were contiguous to the high school and not owned by the county, the board would have the authority without consulting the electorate to purchase the same. Section 1262.83, R.C.M., 1935, as amended by Chapter 207, Laws of 1939. Such a situation would come within the rule of the Morse case, supra. However if non-contiguous lots were to be used for the building, the electorate would have to be consulted under Section 1262.83, as amended, and such an election would be

independent of the bond election.

It is therefore, my opinion that the inclusion of a site for a high school gymnasium in the bond election ballot is surplusage and the location the site must be determined as an independent matter in accordance with Section 1262.83, R.C.M., 1935, as amended by Chapter 207, Laws of 1939.

The lots described in the ballot under consideration are a portion of the present school site and, therefore, their inclusion in the ballot constitutes surplusage.

If lots other than those described are to be used for the gymnasium site, then it will be necessary to proceed in accordance with Section 1262.83, R.C.M., 1935, as amended by Chapter 207, Laws of 1939. Under that section, approval of the electorate is necessary if the lots are not contiguous or part of a previously authorized site.

Your second question is also answered by Section 1262.83, R.C.M., 1935, as amended by Chapter 207, Laws of 1939, which requires that "all boards of trustees of county high schools, or districts maintaining high schools, shall be prohibited from letting any contracts for building, furnishing, repairing or other work for the benefit of the school" without submitting the matter for bids. It is to be noted that the prohibition applies to letting of contracts, and your proposal is to use county machinery for preliminary work and subsequently submit for bids the balance of the construction. Section 1262.83,

as amended, states that the board of trustees shall have the power "at its discretion as restricted by law to build..... high school gymnasiums." The letting of bids would be restricted by law, as above noted, but if the preliminary work is done by the county, then the provisions concerning bids would not be applicable.

It is therefore, my opinion that the preliminary work in the construction of a county high school gymnasium may be done by the county and funds realized from bonds used in such work.

Sincerely yours,

R. V. BOTTOMLY,
Attorney General

Opinion 43 - 1947

Held: A school site may be sold by the Board of Trustees of a school district either under the provisions of subdivision 8 of Section 1015 R.C.M.,1935, as amended, or under the provision of Chapter 106, Laws of 1939, as amended, and that the fact the site and property may be desirable for school purposes for schools other than those maintained by the district will not preclude the sale by the district.

June 24, 1947

Mr. James Freebourn
County Attorney
Silver Bow County
Butte, Montana

Dear Mr. Freebourn:

You have requested my opinion concerning the procedure to be followed in the sale of the site formerly used by the high school. You advise me that there have been inquiries made by other schools for the purchase of the property for school purposes.

This office considered the sale of school sites in Opinion No. 15, Volume 21, Report and Official Opinions of the Attorney General, and held:

> "Abandoned school sites may be sold by the Board of Trustees of a school district either under the provisions of subdivision 8 of Section 1015, R.C.M., as amended, or under the provisions of Chapter 106, Laws of 1939."

While the above opinion was written, prior to the amendment of Chapter 106, Laws of 1939, by Chapter 232, Laws of 1947, yet the rule is not altered by Chapter 232 as the effect

of Chapter 232 is to provide for the disposition of the funds realized from the sale.

If the Board of Trustees decides to proceed under Chapter 106, Laws of 1939, as amended, in making the sale, the detailed steps to be taken must be followed.

It is to be noted that Chapter 106, as amended, provides that "the Board shall duly pass a resolution declaring such lands, buildings, fixtures or other property to be or about to become abandoned, obsolete, undesirable or unsuitable for school purposes of said District." The fact that the site may be suitable for some school other than that maintained by the district does not precludethe district from finding that the site and buildings are not desirable for the district's schools and therefore are abandoned. As indicated by the quoted portion of Chapter 106, it is the lack of usefulness for "school purposes of said District" which authorizes the board to initiate the procedure for the sale of the property.

It is therefore, my opinion that a school site may be sold by the Board of Trustees of a school district either under the provisions of subdivision 8 of Section 1015, R.C.M., 1935, as amended, or under the provisions of Chapter 106, Laws of 1939, as amended, and that the fact the site and property may be desirable for school purposes for schools other than those maintained by the district will not preclude the sale by the district.

Sincerely yours,
R. V. BOTTOMLY
Attorney General

Opinion 72 - 1947

Held: The territory of a school district which is attached to another school district by reason of abandonment in accordance with the provisions of Section 970, R.C.M., 1935, as amended, is not liable for the bonded or warranted indebtedness of the school district to which the abandoned district is attached.

October 20, 1947

Mr. E.W. Popham
County Attorney
Dawson County
Glendive, Montana

Dear Mr. Popham:

You have requested my opinion concerning the liability of a school district which was annexed to another district for the bonded or warranted indebtedness of the latter district. You advised me that the district which was annexed was an abandoned district within the meaning of Section 970, R.C.M., as amended by Chapter 168, Laws of 1943.

Under Section 970, R.C.M., 1935, as amended by Chapter 168, Laws of 1943, the property of such abandoned district would be liable for any indebtedness of the district and the property of the district to which the abandoned district was attached, would not be liable. This section is silent as to the liability of the abandoned district for the debts of the district to which the abandoned district is attached. Analogous situations arise in the creations of new districts or

the consolidation of districts which come within the provisions of Section 1029.1, R.C.M., 1935. This last section limits the liability for bonded indebtedness to the original territory against which such bonds were issued.

In Opinion No. 91, Volume 15, Report and Official Opinions of the Attorney General, this office considered the liability of the territory of an abandoned district for outstanding bonds of the district to which the abandoned district was annexed and held that the territory of the abandoned district could not be subjected to a tax levy for the payment of the bonds. Many cases were cited and reference is made to the opinion for the reasoning found therein.

It is therefore, my opinion that the territory of a school district which is attached to another school district by reason of abandonment in accordance with the provisions of Section 970, R.C.M., 1935, as amended, is not liable for the bonded or warranted indebtedness of the school district to which the abandoned district is attached.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 134 - 1948

Held: A school district has the authority to operate and maintain a school located upon ground which has been leased to it by the United States government and the students attending such school will receive full credit for their work as in any public school of this state, if the school is supervised and accredited by the proper officers of the state.

August 20, 1948

Miss Elisabeth Ireland
Superintendent of Public Instruction
Capitol Building
Helena, Montana

Dear Miss Ireland:

You have requested my opinion concerning the authority of a Montana school district to operate and maintain a school located on United States government property.

You advised me that the contractor who is constructing a dam for the government must, under his agreement, provide education for the children of government employees. The construction of a school building is also a part of the contractor's obligation.

You also state that a lease for the school site and building could be made to the district in the event the board of trustees deemed such an arrangement advantageous and to the best interests of the district.

Sub-section 8 of Section 1015, R.C.M., 1935, as amended, makes it the duty of school trustees to acquire sites for

school houses which the district will own. This would, by implication, permit the leasing of land for the use of such schools and would also allow the district to operate a school on land to which a formal lease has not been given. Section 1006, R.C.M., 1935, as amended by Chapter 206, Laws of 1939 provides for notice to the trustees by the owner of land of the termination of the use by the district of school sites "used by will or suffrance." By such enactment it would appear our legislature has recognised that schools have been located and operated on land to which the district had rights that were less than a freehold or leasehold interest. However, it would be advantageous to school districts always to have a deed or a written lease in such instances, and thus avoid uncertainty as to the districts rights.

In your letter you state that the contractor must, under such an arrangement, pay to the district tuition charges for the education of employees' children. Sub-section 3 of Section 1015, R.C.M., 1935, as amended, grants the power to school trustees "to determine the rate of tuition of non-resident pupils." It will, therefore, be a subject for negotiation between the school trustees and the contractor of the amount of the tuition charge.

I further understand that under the contract of construction, the contractor has obligated himself and his bondsmen to provide a school building or buildings, the heat, light, and all

necessary equipment, as well as the necessary instructional staff; in fact, to provide at his own expense a school that will in all respects meet the standards and qualifications required by our state laws of all public schools for all of the school children who have accompanied their parent, guardian or legal representative, who are employed by the contractor in or about the dam and the works.

The school contemplated will be operated within the boundaries of the school district and will be used primarily for the children of employees, yet the location of the school site on government land should not preclude the school district from exercising its supervisory powers, if it is determined by the board of trustees to be more advantageous to the district to assume such responsibility and relieve the contractor thereof.

It is therefore, my opinion that a school district has the authority to operate and maintain a school located upon ground which has been leased to it by the United States government and the students attending such school will receive full credit for their work as in any public school of this state, if the school is supervised and accredited by the proper officers of the state.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 144 - 1948

Held: The legislature has provided where a district has been abandoned and the territory annexed to another district and the requirements, as amended have been ascertained and determined it is mandatory on the Board of Trustees of the district to which the abandoned territory is attached to provide a school for such children when requested to do so by the parents of at least three of such children.

October 15, 1948

Mr. John F. McGough
County Attorney
Jefferson County
Boulder, Montana

Dear Mr. McGough:

You have submitted for my opinion the following:

> "Where a school district has been abandoned and annexed to another district and where there are five or more children in such abandoned territory eligible for attendance in an elementary school, as determined by the County Superintendent, and such children reside more than three miles from an established school in the district to which the abandoned territory is attached, are the trustees of such district to which the abandoned territory has been attached, required to furnish a school for such children."

The answer to your inquiry is found in Section 970 R.C.M., 1935, as amended by Chapter 168, Laws of 1943.

Prior to the amendment, there was no relief for such situated school children. A protest from all over the State arose because of the harsh results of abandoning a district

and annexing the territory to another district without providing for the elementary school children that might be residing in such abandoned territory.

The legislature, to correct the situation, amended Section 970 R.C.M., 1935, by Chapter 168, Laws of 1943, by providing the same method of abandoning a school district and then made provision for a school in such abandoned territory under the following condition.

1. Whenever there are five or more children in such abandoned territory eligible for attendance in an elementary school.

2. Such eligibility to be determined by the County Superintendent.

3. Said children residing more than three miles from an established school in the district to which the abandoned territory is attached.

4. That after the foregoing requirements have been ascertained then:

5. The School Trustees shall provide a school in abandoned territory when requested so to do by the parents of at least three of such children.

Therefore, it is my opinion the legislature has provided that where a district has been abandoned and the territory annexed to another district and when the requirements, Nos. 1, 2, and 3, set forth above have been ascertained and

determined to be correct, then the legislature, by the above mentioned amendment, has made it mandatory on the Board of Trustees of the district to which the abandoned territory is attached, to provide a school for such children when requested to do so by the parents of at least three of the children.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 73 - 1949

Held: County Superintendent of Schools must declare a school district abandoned where school has not been held for three (3) consecutive years, and the School Trustees have no provided transportation in school bus operated under contract let by school district. Furnishing of any service in lieu of transportation to children of district will not preclude district from being declared abandoned.

December 1, 1949

Mr. Robert J. Nelson
County Attorney
Cascade County
Great Falls, Montana

Dear Mr. Nelson:

You have requested my opinion concerning the power of the County Superintendent of Schools to declare the abandonment of a school district in which school has not been actually held during the last three years. You advised me that the children of the district have been attending school in a nearby district and the district of their residence has been paying to the parents of the children money in lieu of providing actual bus transportation.

Section 970, R.C.M., 1935, as amended by Chapter 168, Laws of 1943, provides that the County Superintendent "must declare a school district abandoned when terms of school aggregating at least twelve (12) months have not been actually

held in a district during a period of three (3) consecutive years." Section 970 contains an exception which is pertinent to the facts which you submitted and reads as follows:

> "That if any such district has provided transportation for all children of school age, living within the district, to another district for the purpose of attending school therein for a term of at least six (6) months during each of such three (3) years, such transportation to be by means of a safe and proper omnibus or omnibuses, driven or operated by the Board of Trustees of the district, and which driver, or drivers, shall be under proper and sufficient bonds, such transportation shall be deemed equivalent to the actual holding of school in such district for a term of six (6) months in each yesr, and such district shall not be ordered abandoned."

It is to be noted in the above quoted exception that bus transportation under contract let by the trustees of the district will relieve the district from any question of being abandoned. Section 2 of Chapter 152, Laws of 1941 defines "transportation" as used in the school transportation act to include payments to parents in lieu of furnishing actual bus transportation. As Section 970, as amended, deals specifically with the abandonment of school districts its terms, which are unambiguous, will control the determination of the manner of declaring school districts abandoned.

This office in Opinion No. 182, Vol. 19, Report and Official Opinions of the Attorney General considered the exception found in Section 970 and it was stated therein as follows:

> "In making the exception to the law, the Legislative intent is clear to the effect other modes of transportation, such as rent, board and room,

paying parents or guardian and providing supervised correspondence study or supervised home study, are not to be considered."

This office has held in many opinions that the actual transportation in school buses operated by the district is necessary to prevent the abandonment of a district under the provisions of Section 970, R.C.M., 1935. See Opinion No. 344, Vol. 19, Report and Official Opinions of the Attorney General for an extensive discussion of the interpretation of the statute in question.

It is therefore, my opinion that the County Superintendent of Schools must declare a school district abandoned where school has not been held for three (3) years, consecutively, and the trustees have not provided transportation in a school bus operated under a contract let by the district and that the furnishing of any service in lieu of transportation to the children of the district will not preclude the district from being declared abandoned.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 91 - 1950

Held: An elementary school may be constructed adjacent to an existing elementary school and on the same site after the qualified electors of a third class school district have authorized the construction of a new elementary school at a bond election, without the necessity of an election to designate the site for the new building.

February 10, 1950

Mr. Walter T. Murphy
County Attorney
Mineral County
Superior, Montana

Dear Mr. Murphy:

You have requested my opinion concerning the necessity for an election for a school site in a third class school district. You advise me that bonds were authorized at an election to construct it adjacent to the old elementary school and the two are to be connected.

The construction of the new elementary school on land which is a part of the location of the old elementary school will not result in a change of the school site. This office, in Opinion No. 118, Volume 21, Report and Official Opinions of the Attorney General, quoted with approval from 58 C. J. 740 the definition of "site" as follows:

> "A plot of ground suitable or set apart for some specific use; a seat or ground plot. The term does not of itself necessarily mean a place or tract of land fixed by definite boundaries."

From the above quoted it is reasonable to interpret the use of the word "site" in our codes as meaning a general location for a specific purpose. The site for the old elementary school was selected by the qualified electors in accordance with Section 75-3101, R.C.M., 1947, which provides for the election in school districts of the third class. Nichols v. School District No. 3, 87 Mont. 181, 287, Pac. 264.

The question submitted to the electors in the bond election recited that the bonds were to be issued "for the purpose of constructing a new grade or school building." Subsection (a) of Section 75-3901, R.C.M., 1947, is the authority for the submission of such a question and the site having been previously selected, the new building may be constructed on the site.

If a new site had been contemplated by the trustees or the electorate an independent election could be held for the determination of such question under the procedure set out in Section 75-3101, R.C.M., 1947. As no such question has been presented there is no need for an election.

It is therefore my opinion that an elementary school may be constructed adjacent to an existing elementary school and on the same site after the qualified electors of a third class school district have authorized the construction of a new elementary school at a bond election, without the necessity of an election to designate the site for the new building.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 123 - 1952

Held: The Board of County Commissioners does not have the power to give to a school district a public park owned by the county for the use of the school district as a school site.

October 1, 1952

Mr. Michael J. O'Connell
County Attorney
Gallatin County
Bozeman, Montana

Dear Mr. O'Connell:

You have requested my opinion concerning the authority of the board of county commissioners to make a gift of lands contained in a federal townsite and designated for public park purposes to the board of trustees of the school district to be used by the school district as a school site. The land in question is not in an incorporated city or town and there is no problem of ownership by the federal government.

The power of a county to acquire land for park purposes is found in Section 62-101, Revised Codes of Montana, 1947, which reads in part as follows:

> "The several counties of this state are hereby authorized and empowered to acquire by purchase, grant, deed, gift, devise or condemnation, or otherwise, lands suitable for public camping and public recreational purposes, civic centers, youth centers, museums, recreational centers and any combination thereof, or may lease such land tracts, each of which shall be so situated as to offer ready access to a public highway."

Also, a county has the authority to hold lands within its limits under the provisions of Section 16-804, R.C.M., 1947. There is no statutory authority authorizing a county to vacate the use of the land for park purposes. In the case of Lloyd vs. City of Great Falls, 107 Mont. 442, 86 Pac. (2d) 395, the court quoted with approval the following:

> "Where lands have been dedicated and used for a public park or square, the municipal corporation holds the title in trust for the public and has no power, unless specially authorized by the legislature, to appropriate such lands for the use and benefit of private persons or corporations, sell the same, or in any way divert the land from the uses and purposes of its original dedication."

In the absence of specific statutory authority to vacate the land for park purposes the board of county commissioners does not have the power to divert the use of the land to the school district. The board of county commissioners has only such powers as are conferred by law, either expressly or by implication, Lewis vs. Petroleum County, 92 Mont. 563, 17 Pac. (2d) 60.

I realize that the public interest might be served by authorizing the county to give the land to the school district. However, such cannot be considered as the rules stated in Franzke vs. Fergus County, 76 Mont. 150, 245 Pac. 962, applies to the problem presented. The court in this case said:

> "The fact that the contemplated action may be in the best interest of the county is not an admissible argument. The doctrine of expediency does not enter into the construction of statutes."

It is therefore my opinion that the board of county commissioners does not have the power to give to a school a public park owned by the county for the use of the school district as a school site.

VEry truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 32 - 1955

Held: A high school building financed by bonds issued by a high school district, may be constructed on land owned jointly by the county high school and a school district.

August 4, 1955

Mr. Edwin T. Irvine
County Attorney
Granite County
Phillipsburg, Montana

Dear Mr. Irvine:

You have requested my opinion as to whether a new high school building financed by bonds issued by the high school district may be built on land owned jointly by the county high school and a school district.

High school districts, as provided in Section 75-4605, R.C.M., 1947, are established for construction, repair, improvement and equipment purposes only. This law was enacted to provide an additional method of borrowing money. High school districts are not operating units of our school system and do not have budgets for the maintenance of the schools constructed from the proceeds of high school building district bonds. In Pierson vs. Hendricksen, 98 Mont. 244, 38 Pac. (2d) 991, the court approved the expenditure of funds realized from high school district bonds on the county high school and said:

> "Nor is it of controlling importance that the improvements contemplated are to be made on the

> county high school building, legal title to which is in the county. The county, in the management of the county high school, is simply the agency of the state for that purpose...The beneficial title of the school property is in the state." (Cases Cited)

From the above quoted it must be concluded that the fact that the beneficial title to school property is in the state permits the use of high school district funds on property of the county high school. In Habel vs. High School District "C", Mont., Pac. (2d), 12 St. Rep. 170, it was held that lots acquired by the trustees of a school district as the site for a high school, financed by bonds issued by the high school district may be used as a proper location for the construction of the new high school building.

As a high school district is organized primarily for raising construction funds, there are no statutory restrictions on the uses of the funds. However, the money realized from bonds must be used for high school purposes and the title to the land where the building is located is not material so long as it is school land.

It is therefore my opinion that a high school building financed by bonds issued by a high school district, may be constructed on land owned jointly by the county high school and a school district.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

CHAPTER REFERENCES

The following official opinions of the attorney general can be found in Volume 21 of the Report and Official Opinions of the Attorney General.

Opinion 3 - 1946

The following official opinions of the attorney general can be found in Volume 22 of the Report and Official Opinions of the Attorney General.

Opinion 43 - 1947
Opinion 72 - 1947
Opinion 134 - 1948
Opinion 144 - 1948

The following official opinions of the attorney general can be found in Volume 23 of the Report and Official Opinions of the Attorney General.

Opinion 73 - 1949
Opinion 91 - 1950

The following official opinion of the attorney general can be found in Volume 24 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 123 - 1952

The following official opinion of the attorney general can be found in Volume 26 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 32 - 1955

CHAPTER XIII

MISCELLANEOUS OPINIONS

Opinion 110 - 1946

Held: A liquor license may not be granted for use on premises which are directly across the street from a school although the main entrance of the school is not on the same street as the premises applying for the license, but the entrance of the school is within six hundred feet of the entrance of the premises seeking the license.

January 2, 1946

Honorable Sam C. Ford
Governor of Montana
State Capitol
Helena, Montana

Dear Governor Ford:

You have requested an opinion from this office concerning the granting of a liquor license for premises located in the 3800 block on Second Avenue North, directly north of and across Second Avenue North from the school for the deaf and blind, whose address is 3800 Second Avenue North, Great Falls, Montana.

You also submitted a plat showing the location of the school and the premises operating under the license. It would appear from the plat that the main entrance of the school is not on the same street as that of the licensed premises, but that the side lawn of the school is directly across the street. The distance in a straight line between the center of the main

entrance of the school and the center of the nearest entrance of the licensed premises is less than six hundred feet.

Chapter 84, Laws of 1937, was adopted by vote of the people at the general election held November 8, 1938 and became effective by virtue of the Governor's proclamation on January 21, 1939.

Section 13 of the act provides:

> "No license shall be granted for any premises which shall be on the same street or avenue and within six hundred feet of a building occupied exclusively as a church, synagogue or other place of worship, or school, except a commercially operating school; the measurements to be taken in a straight line from the center of the nearest entrance of such school, church, synagogue or other place of worship to the center of the nearest entrance of the premises to be licensed; except however that no license shall be denied because such restriction may apply to any premises so located which are maintained as a bona fide hotel, restaurant, railway car, club or fraternal organization or society except similar places of business established and in actual operation for one year prior to the passage and approval of this act."

The obvious purpose of the above quoted section is to protect students from the environment surrounding a tavern which serves liquor. The public policy involved is to protect the young and in construing such a statute, the principle set out in In re Wilson's Estate, 102 Mont. 178, 56 Pac. (2d) should be followed. The court said:

> "In the construction of a statute the primary duty of the court is to give the effect to the intention of the legislature in enacting it."

The main entrance of the school is not on the same street as the tavern, but only the grounds of the school are across the street therefrom. Section 13 provides in part that "no license shall be granted for any premises on the same street or avenue.....as a school." The act could have provided that the school and the proposed licensed premises must front on the same street for the tavern to be in the prohibited class. However, the act does not so provide, but does prohibit the licensing of premises on the same street when the entrances of the two buildings are within six hundred feet of each other.

It is therefore my opinion that under the facts presented, a liquor license may not be granted for use on premises which are directly across the street from a school although the main entrance of the school is not on the same street as the premises applying for the license, but the entrance of the school is within six hundred feet of the entrance of the premises seeking the license.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 164 - 1946

Held: A school district, through its board of trustees, does not have the power or authority to enter into an oil and gas lease concerning school district land which is not necessary for school purposes.

June 6, 1946

Mr. Wilbur P. Werner
County Attorney
Glacier County
Cut Bank, Montana

Dear Mr. Werner:

You have requested my opinion whether a school district may enter into an oil and gas lease. You advise me the land in question is an abandoned school site one acre in area and the school board does not anticipate the land will be needed in the future for school purposes.

Subsection 9 of Section 1015, R.C.M., 1935, as amended, makes it the duty of the board of trustees to hold property for the benefit of the school. In other words, the power and duty of the school district is to own real property for school purposes, and the grant of power is not given for the purpose of permitting the district to engage in profit ventures.

Section 1008, R.C.M., 1935, as amended by Chapter 206, Laws of 1939, provides in part:

> "The trustees of the district shall have the power to lease any property belonging to the district which is not being used for school purposes."

The above quoted portion of Section 1008 is broad in its terms, but must be construed in relation to other pertinent statutes. (Register Life Insurance Co. v. Keniston, 99 Mont. 191, 43 Pac. (2d) 251.)

Our Supreme Court in Young v. Board of Trustees, 90 Mont. 576 4 Pac. (2d) 725, held a school district had the power to rent a school building for public dances under a statute which authorized the trustees "to rent, lease and hire such halls, gymnasiums and buildings and portions of buildings as may be suitable for public entertainment." The court considered the question of a school district entering into competition with citizens who operated similar places of entertainment and held by the above statute that the legislature had fixed the public policy in the matter. The court observed the fact that tax exempt property was used in competition and noted the commercial aspect of the power granted the trustees.

In Herald v. Board of Education, 65 W.Va. 765, 65 S.E. 102, the court held a board of education could not lease a schoolhouse lot for the production of oil and gas, since it had only the powers given by statute and such as were absolutely necessary to execute its powers, and could not engage in business or make contracts outside its functions touching education.

Our court, in McNair v. School District No. 1, 87 Mont. 423, 288 Pac. 188, stated:

> "A school district is a political subdivision of the state, created for the convenient dispatch of public business. It is a public corporation. The Board of Trustees, therefore, constitutes the board of directors and managing officers of the corporation, and may exercise only those powers expressly conferred upon them by statute and such as are necessarily implied in the exercise of those expressly conferred. The statute granting power must be regarded both as a grant and a limitation upon the powers of the board..."

It would appear from the above quoted limitation on the powers of the trustees that they must be able to point to a specific statute authorizing an oil and gas lease. Such a lease would mean the district was engaging in a commercial enterprise for profit which was far removed from any educational function.

This office, in Opinion No. 19, Volume 21, Report and Official Opinions of the Attorney General, held the trustees of a school district had the power, under Section 1008, R.C.M., 1935, as amended, to lease a teacherage not needed for school purposes as a residence. However, it was said "in making the lease the trustees must bear in mind that the property in question is trust property which is for the benefit of the schools." The underlying principle is that the power to grant a lease is ancilary to the trust for school purposes and is limited at all times by the necessity of utilizing the property for the schools.

While it is a fortuitous circumstance that abandoned school land has an enhanced value because of its proximity to a

producing oil well, yet such a fact would not justify the trustees in engaging in a long time lease with a purely commercial aspect. The whole theory and policy of our school laws is to give to the school trustees the powers necessary and requisite to manage and conduct schools for school purposes only.

The trustees may realize a profit by the sale of the lands upon being directed to do so by the electors of the district. Such a sale would have to be of the whole of the property as there is no provision in the statutes granting the power to sell for the reservation of the mineral interests. The procedure for sale was set out in an opinion of this office, Opinion No. 15, Volume 21, Report and Official Opinions of the Attorney General, and I refer you to it.

It should be kept in mind the legislature determines the policy and the law governing school districts, and the authority of boards of school trustees. Boards of county commissioners for many years have been granted the authority to lease county owned lands, but before they could enter into an oil and gas lease for the county on such lands, it was necessary for the legislature to enact special enabling laws granting to boards of county commissioners that particular authority and setting up procedural practice therefore. The legislature may see fit to grant such authority to boards of trustees of school districts, but until such enabling legislation is enacted, it

would appear to me that such a procedure is beyond the present authority granted to boards of school trustees by the legislature.

It is therefore, my opinion a school district, through its board of trustees, does not have the power or authority to enter into en oil and gas lease concerning school district land which is not necessary for school purposes.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 44 - 1947

Held: The residence of a child committed to the State Orphans' Home is that of his parents. If the parents move from the state of Montana the county of the former residence of the parents is no longer under obligation to transfer funds to the high school at Twin Bridges in Madison County. The expense of such education is the obligation of the State of Montana.

July 11, 1947

Mr. J. Chandice Ettien
County Attorney
Granite County
Philipsburg, Montana

Dear Mr. Ettien:

You have requested my opinion concerning the following:

A child whose parents were resident in Granite County was committed by the district court to the Montana State Orphans' Home. The parents subsequent to the commitment moved from Granite County to the State of Washington. Must Granite County provide for the transfer of funds to Madison County for the education the child in the High School located at Twin Bridges under the provision of Chapter 219, Laws of 1943?

The question to be decided is the residence of the child, as Chapter 219 provides that the county treasurer of the county of a pupil's residence shall transfer to the Twin Bridges High School in Madison County funds for education of the child.

Section 33, R.C.M., 1935, provides in part:

> "The residence of the father during his life, and after his death the residence of the mother while she remains unmarried is the residence of the unmarried minor child."

From the above quoted it would appear that the residence of the child follows that of the father and would now be in the State of Washington.

In State ex rel Johnson v. Kassting, 74 Mont. 25 238 Pac. 582, our Court considered the residence of girls committed to the Vocational School in Lewis and Clark County. The Court held that even if the state has become the guardian of the child committed, the residence of such minor children will not be changed by the committment to the school. The Court said:

> "Therefore these girls cannot be held to have acquired a residence in School District No. 6 of Lewis and Clark County, nor lost their residence in the county in which their parents resided by reason of committment to this school."

There is an apparent conflict between the rule stated in the above case and Section 5850, R.C.M., 1935, which permits a parent entitled to the custody of a child to change his residence. As the commitment to the Orphans' Home deprives the parents of the custody of the child, it might well be argued that the right to change the residence is dependent on the right to custody. However, Section 5850 must be considered in conjunction with related sections and the conclusion reached that the section has reference to the conflicting claims of the two parents, and no application when there is no

controversy between the parents, as is the case here. Also the general rule is stated in 17 Am. Jur. 628:

> "A needy, delinquent, or neglected child does not lose the domicile of its parents by being sent to an institution."

It might be urged that Section 1051, R.C.M., 1935 as amended, would also preclude the childfrom being considered a resident of Granite County as this section fixes the rules for the making of the school census. However, the transfer of funds under Chapter 219, Laws of 1943, is based on the residence of the pupil, and whether the pupil is included in the school census is immaterial.

The parents of the child having moved from the state of Montana and thus relieved the county from the duty to transfer funds, it now becomes the duty of the State to pay the expense of education, as Section 1492 and 1493, R.C.M., 1935, provide that inmates of the Orphans' Home are to receive free educational benefits at the expense of the State. Chapter 219, Laws of 1943, would control, being subsequent legislation, if the parents continued to reside in Montana, but having departed, Sections 1492 and 1493 will fill the need and supply the necessary funds.

It is therefore, my opinion that the residence of a child committed to the State Orphans' Home is that of his parents. If the parents move from the State of Montana the county of the former residence of the parents is no longer under

obligation to transfer funds to the high school at Twin Bridges in Madison County. The expense of such education is the obligation of the state of Montana.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 92 - 1948

Held: 1. The state and local boards responsible for vocational education have the responsibility of furnishing and providing related and supplemental instruction for apprentices, and the coordination of instruction with job experience, and the selection and training of teachers and coordinators for such instruction.

2. The state board of education is designated as the state board for vocational education and has the authority to make all rules and regulations governing the establishment, conduct and administration of vocation courses, including the power to fix the qualifications of instructors and the course of study to be followed, in conformity with the requirements of the federal board of vocational education.

3. The Apprenticeship Council is authorized to make rules and regulations, but such rules and regulations must be limited in their purpose and effect as aid in the administration of the law.

4. It was the purpose and intent of the legislature that all departments of state and federal government concerned with the administration of the act, or its fulfillment, to cooperate to the fullest extent within their respective fields, to the end that the apprentice may receive the full benefits of the act.

January 6, 1948

Montana State Apprenticeship Council
Mr. James B. O'Brien, Chairman
State Capitol
Helena, Montana

Dear Sir:

You have submitted the following question for my opinion:

"1. Is the Montana State Apprenticeship Council as a whole responsible for providing 'related and supplemental instruction for apprentices', including the selection of teachers, providing textbooks, outlining the classroom curricula and other such similar factors, or does this entire responsibility rest with state and local boards responsible for vocational education?

"2. Is there a State Vocational Education Department or some other Department or Division of the State Government who might have the responsibility of providing such related and supplemental instruction for apprentices? If so, what is the official name of the Department or Division?

"3. If there is such a State Department or Division of Vocational Education, is it directly under the supervision of the State Superintendent of Public Instruction or the State Board of Education, or is there some other department, board, bureau, or division under which the Department of Vocational Education operates? If so, what is the name and officers of such a Department, board, bureau, or division?

"4. Does the Council have the authority to issue rules and regulations as may be necessary to carry out the intent and purposes of the act, which in the opinion of the Council would rebound to the benefit and protection of the apprentices and the industry involved as a whole?

"5. Is it the intent and purpose of the Act to cause governmental agencies such as the Council itself, the Federal Apprentice Training Service or Federal Committee on Apprenticeship, the State Department of Vocational Education, the Federal Veterans Administration, the State Superintendent

> of Public Instruction and the State Board of Education to cooperate with each other, causing bona fide apprentice training to come about and related instruction for apprentices to become a possibility in fact? If, for example, related instruction is not being provided apprentices by the Vocational Education Departments and the apprentices suffer because of the lack of such supplemental related instruction, then should not the Council as a whole, as well as the other governmental agencies, do whatever be within their power and through legal means to cause the State Department of Vocational Education and the Local Coordinators for Vocational Education to bring about related instruction for apprentices?"

As to your first question, I call your attention to Section 2 (5) of Chapter 149, Laws of 1941, which provides as follows:

> "Related and supplemental instruction for apprentices, coordination of instruction with job experiences, and the selection and training of teachers and coordinators for such instruction shall be the responsibility of the state and local boards responsible for vocational education."

Your second and third questions may be considered together. By Chapter 148, Laws of 1931, now Section 1262.93 to and including 1262.100, R.C.M., 1935, as amended by Chapter 160, Laws of 1939, the legislature reaffirmed the state's acceptance of the Act of Congress providing for promotion of vocational education in the several states. By said Chapter 148, the state board of education was given authority, "to adopt all necessary rules and regulations governing the establishment, conduct and administration of vocation courses, including the power to fix the qualifications of instructors and the course of study to be followed..." The Act also provides for the

appointment of an advisory committee consisting of four citizen members representing the manufacturing and commercial interests, the agricultural interests, skilled labor and home making interests, and the state superintendent of public instruction or a person designated by the state superintendent. The board is directed to cooperate with the several boards of trustees of school districts and of county high schools in the establishment and maintenance in the public elementary and high schools, appropriate courses for vocational training in agriculture, home economics, the trades and industries and commercial branches.

The State Superintendent of Public Instruction is the executive officer of the vocational board and is charged with the responsibility for the administration of all laws of Montana relating to vocational education, and the rules and regulations promulgated by the board.

The state board of education, therefore, is constituted the state board for vocational education.

Chapter 160, Laws of 1939, authorizes the state board for vocational education to designate any district high school, county high school or high school district maintaining a vocational training department as a vocational center. This chapter also provides that all rules and regulations governing admission to such centers shall be promulgated by the state board for vocational education.

As to your fourth question, Section 1 (b) (2), of Chapter

149, Laws of 1941, provides:

> "(2)...issue such rules and regulations as may be necessary to carry out the intent and purposes of this act;...."

The Council, therefore is authorized to make rules and regulations as are necessary to carry out the intent and purposes of the Act. In the case of McFatridge v. District Court, 113 Mont. 81, 88, 122 Pac. (2d) 834, our Supreme Court in speaking of the power and authority of the Montana Liquor Control Board to make rules and regulations under a similar provision in the Liquor Control Act as the abovesaid:

> "The board is an administrative body, functioning as a bureau of the executive department of the state government. It has no lawmaking power. Any attempt to create for itself authority and discretion not given by the legislature must fail. The board is authorized to make rules and regulations, but these must be limited in their purpose and effect as aid in the administration of the law."

Your Council may, therefore, make rules and regulations, but such must be limited in their purpose and effect as aid in the administration of the law.

It is very apparent from a reading of the provisions of the Apprenticeship Act that the legislature intended its administration to be in conformity and in conjunction with the federal legislation on apprenticeship. In providing for the personnel of the Council and its composition, it would seem clear that the intent was to have all those departments of state government represented in such council to work together

in their respective fields to carry out the purposes and intent of the law to the end that the apprentice be given the full benefits therein provided. It is only by the full cooperation of all those departments mentioned in your fifth question that the prupose of the act may be fully carried out and those intended to be benefited thereby receive all benefits intended.

It is therefore, my opinion:

1. The state and local boards responsible for vocational education have the responsibility of furnishing and providing related and supplemental instruction for apprentices, and the coordination of instruction with job experience, and the selection and training of teachers and coordinators for such instruction.

2. The state board of education is designated as the state board for vocational education, and has the authority to make all rules and regulations governing the establishment, conduct and administration of vocation courses, including the power to fix the qualifications of instructors and the course of study to be followed, in conformity with the requirements of the federal board of vocational education.

3. The Apprenticeship Council is authorized to make rules and regulations, but such rules and regulations must be limited in their purpose and effect as aid in the administration of the law.

4. It was the purpose and intent of the legislature that all departments of state and federal government concerned with the administration of the act, or its fulfillment, to cooperate to the fullest extent within their respective fields, to the end that the apprentice may receive the full benefits of the act.

Sincerely yours,

R. V. BOTTOMLY
Attorney General

Opinion 123 - 1950

Held: The title to a school building erected on the land of an individual under a tenancy at will or sufferance remains in the district and can be removed by the district until title is divested as provided in Section 75-1624, R.C.M., 1947.

August 10, 1950

Mr. M. K. Daniels
County Attorney
Powell County
Deer Lodge, Montana

Dear Mr. Daniels:

You have requested my opinion concerning the ownership of a school house which has not been used for school purposes for several years. You advised me that the school building is located on land which is owned by an individual. You also state that there was no written lease or agreement concerning the use of the land by the district.

The problem presented is answered by Section 75-1624, R.C.M., 1947, which reads in part as follows:

> "Whenever, after the passage and approval of this act, a conditional deed has been issued to a school district for land or whenever land has been used at will or sufferance for a school site and therehas been built upon such land a school house and other improvements, and said building and improvements cease to be used for the maintenance of a school in accordance with the provisions of Section 75-1631 and 75-1632, said Board of Trustees must be notified in writing by the owner or claimant of the land which which has been so deeded or used by will or sufferance for a school site that he intends to repossess the land and the school trustees shall within a period of not exceeding one (1) year, remove the building and improvements placed thereon or they shall be

> deemed thereafter to have forfeited any further right to such property. Provided futher that before the landowner or claimant to said land shall have the right to give the notice of removal aforesaid, the intent to abandon said land by the school district must have been expressed by the dulty qualified electors in the school district in accordance with the provisions of subdivision eight (8) of Section 75-1632.

It is to be noted from the above quoted statute that the owner of the land before he can claim title to the building must give written notice of his intention to repossess the land reciting that the trustees shall remove the building within a year's time. This is a statutory recognition that a school house located on the land of another is the property of the district and the school district can be divest of title only by failure to remove after written notice.

As was stated in Van Ness v. Pacard, 2 Pet (U.S.) 137, 7L Ed. 374:

> "The general rule of the common law certainly is that whatever is once annexed to the freehold becomes part of it, and cannot afterwards be removed except by him who is entitled to the inheritance. The rule, however, never was, at least as far back as we can trace into the books, inflexible and without exception."

The exceptions referred to above are multiple in regard to trade fixtures and include buildingsuused in trade such as filling stations. In Farmer v. Golden Rule Oil Co., 130, Kan. 803, 287 Pac. 706, the court held that a tenant who had leased premises for a filling station under a five-year lease could remove the building erected by him at the end of his lease without a specific reservation of the right to do so in the

lease. Cases of similar import which permitted the removal of building erected for commercial purposes are the following:

Firth v. Rowe 53 N. J. Eq. 520, 32 A 1064
Earle v. Kelly 21 Cal. App. 480, 132 Pac. 262
R. Barcroft and Sons Co. v. Cullen 217 Cal. 708, 20 Pac. (2nd) 665

Only one case has come to our attention concerning a school building. In Wittenmeyer v. Board of Education, 10 Ohio C.C. 119, 6 Ohio C.D. 258, 2 Ohio Dec. N. P. 555, it was held that a school building erected upon leased premises by a lessee Board of Education and used exclusively for school purposes, was held to be governed by the same rule as that applying to trade fixtures, and therefore to be removable by the lessee during the term, or within a reasonable time after the expiration thereof, although the lease contained no agreement to that effect.

The fact that there is not any written lease providing that the building cannot be removed leads to the conclusion that the school district used the land at the will or sufferance of the owner. The statutory rule as to the notice and the common law rule concerning fixtures is determinative of the question. The title to the building remains in the district until such time as the owner of the real property divests the district of its title by the notice and procedure provided in Section 75-1624, Revised Codes of Montana, 1947.

It is therefore my opinion that the title to a school

building erected on the land of an individual under a tenancy at will or sufferance remains in the district and can be removed by the district until title is divested as provided in Section 75-1624, Revised Codes of Montana, 1947.

Very truly yours,

ARNOLD H. OLSEN,
Attorney General

Opinion 78 - 1952

Held: The intent of the legislature in enacting the law extending educational benefits to all eligible veterans who served honorably in the United States in any of its wars, is construed as extending the said benefits to veterans of the Korean Conflict, which although not technically declared a war, contains all of the attributes of a war as envisaged by the legislature.

Educational benefits as provided by state law may properly be extended to eligible veterans of the Korean Conflict.

April 25, 1952

Mr. E.J. Callaghan, Director
Veterans Welfare Commission
State of Montana
Helena, Montana

Dear Mr. Callaghan:

You have recently requested my opinion as to whether veterans of the Korean Conflict are entitled to the benefits as provided by Chapter 194, Laws of 1943, as amended by Chapter 44, Laws of 1945. Section 1 of this Act, as amended, reads:

> "All honorably discharged persons who served with the United States forces in any of its wars, and who were bona fide residents of the state of Montana at the time of their entry into said United States forces shall have free fees and tuition in any and all of the units of the University of Montana, including the law and medical departments, and for extra studies in any of the units of the University of Montana, provided, however, that the provisions of this act shall not apply to persons who qualify under the provisions of the

'servicemen's readjustment act of 1944' being 'public law 346 of the seventy eighth-congress, chapter 268, second session' and public law 16 of the seventy-eighth congress, chapter 22, first session,' and all acts supplementary and amendatory thereof."

The answer to your inquiry depends upon the interpretation to be given the above emphasized words. It is evident from the very language of the act that the intent of the legislature was to provide educational benefits to eligible veterans, however it is noteworthy that the provisions thereof were not limited to veterans of World War II, on the contrary the act expressly states that the benefits will accrue to "all honorably discharged persons who served with the United States forces in any of its wars....."

Is the present Korean Conflict a "war" as was contemplated by the legislature at the time of the original enactment of Chapter 194, Laws of 1943, and at the time of the subsequent amendment as contained in Chapter 44, Laws of 1945? In construing a statute, the intention of the legislature is the controlling consideration, and, in the construction thereof, courts may look to the history of the times and the cause of necessity influencing the passage of the Act. (Lerch v. Missoula Buick & Title Co., 45 Mont. 314, 123 Pac. 25; Fergus Motor Co. v. Sorensor, 73 Mont. 122, 235 Pac. 422; State ex rel. Williams v. Kamp, 106 Mont. 444, 78 Pac. (2d) 585). At the period the Act in question was passed, this country and

the citizens of Montana in the armed forces were engaged in a struggle of force against the force and forces of enemy nations. Through an act of Congress this struggle was designated a war and specifically named "World War II". The present struggle in Korea of force against force involves all of the elements of a war with the sole exception that the Congress of the United States has not declared the same to be a war. It has been designated a conflict and a police action.

Realistically war may be defined as hostile contentions by means of armed forces, carried on between nations, states or rulers. (Gillow v. Kiely, D.C.N.Y., 44 F. (2d) 227, 233). It means and intends the destruction of life and property. (The Ambrose Light, 25 F. 408). It was held in Arce v. State, Tex., 202 S.W. 951, L.R.A. 1918 E. 358, that in the battle of San Ygnacio between United States troops led by General Pershing and expeditionary forces of Mexico commanded by officers of the Carranza de facto government, where soldiers engaged in combat were killed, wounded and captured, that a state of war existed. The court in holding such cited an official opinion issued by Brig. Gen. Enoch H. Crowder, Judge Advocate, U.S.A. as follows:

> "It is thus apparent that under the law there need be no formal declaration of war but that under the definition of Vattel a state of war exists so far as concerns the operations of the United States troops in Mexico by reason of the fact that the United States is prosecuting its rights by force of arms and in a manner

> in which warfare is usually conducted. The statutes which are operative only during a period of war have been interpreted as relating to a condition and not a theory. ********* I am therefore of the opinion that the actual conditions under which the field operations in Mexico are being conducted are those of actual war. That within the field of operations of the expeditionary force in Mexico it is a time of war within the meaning of the fifty-eighth article of war."

In the case of Hamilton v. McClaughrey, 136 F. 445, the court stated:

> "Mr. Justice Grier, delivering the opinion in Prize Cases, 67 U.S. (2Black) 666, 17 L. Ed. 459, says: 'War has been well defined to be that state in which a nation prosecutes its right by force.' In the present case, at no time was there any formal declaration of war by the political department of this government. A formal declaration of war, however, is unnecessary to constitute a condition of war.

The court then held that a condition of war existed in China within the spirit and intent of the fifty-eighth article of war.

Recurring to the history of the time when Chapter 194, Laws of 1943, was enacted to determine the intent of the legislature, it was their intent to benefit those citizen veterans who had served during time of war. I cannot limit the construction of that law so as to exclude those veterans who have served their country honorably in the present Korean conflict, which is at least a condition of war.

It is, therefore, my opinion that the intent of the legislature was to provide educational benefits to all eligible

veterans who served in the United States forces in any of its wars, and that the present Korean Conflict, although not technically declared a war, has all the attributes of a war as contemplated by the legislature. It follows, of course, and it is my opinion, that educational benefits should be extended to eligible veterans of the Korean conflict.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

Opinion 124 - 1952

Held: A notice of non-renewal of a contract of an assistant professor given by the chief executive of the institution and approved by the Chairman of the Board of Education is, during the time the office of Chancellor is vacant, in substantial compliance with regulation 5 of the State Board of Education.

October 2, 1952

Miss Mary M. Condon
Superintendent of Public Instruction
State Capitol Building
Helena, Montana

Dear Miss Condon:

You requested my opinion concerning the contract of an assistant professor at Eastern Montana College of Education. You advised me that the assistant professor was under a one year term contract. You also stated that she has not been under contract for three years. Notice was given to her that her contract would not be renewed by the President of the institution with the approval of the Governor as Chairman of the Board of Education.

The problem presented calls for an interpretation of regulation No. 5 adopted by the State Board of Education and incorporated in the contract signed by the assistant professor. This regulation reads as follows:

> "At the expiration of the term of appointment of a professor or an associate professor, if

> appointed for a limited term, or of an assistant professor, lecturer, instructor, or assistant, there is no obligation whatever to renew the appointment, and without renewal the appointment thereupon lapses and becomes void. In every case of such non-renewal of appointment, official notice thereof shall be given by the chief executive of the institution, station, or division, with the approval of the Chancellor, not later than April 15th; provided, that a notice given ninety days prior to the expiration of the contract shall be sufficient in case of the non-renewal of the appointment of any member of the Agricultural Extension Staff."

From the above quoted regulation it appears that a term contract lapses and becomes void if not renewed. However, the regulation also requires that the chief executive of the institution give notice that the contract will not be renewed and such notice must have the approval of the Chancellor. As we know, there is not a Chancellor in Montana at the present time, and as a consequence the approval by the Governor as Chairman of the Board of Education would seemingly be sufficient as it would be unreasonable to preclude a unit of the university from terminating a contract becuase there is not an incumbent in the office of Chancellor. As I observed before, the notice must be given by the chief executive of the institution and approved by the Chancellor. This is required under the regulation, rather than a notice by the Chancellor. In State ex rel. Keeney vs. Ayers, 108 Mont. 547, 92 Pac. (2d) 306, our Supreme Court considered regulation No. 5 and recognized the sufficiency of a notice of termination given by the president

of the institution. It is my understanding the assistant professor does not contend that she did not receive notice in ample time, but does contend that there being no Chancellor she can never receive a notice of non-renewal. Such a contention, if it were valid, would mean that any assistant professor who received a term contract for one year would thereby secure permanent tenure.

The subject of a permanent appointment is within regulation No. 2, which reads as follows:

> "Professors and associate professors are on permanent appointment; provided, however, that the initial appointment to a full professorship may be for a limited term. Such limited term appointment may be renewed; provided, however, that reappointment, after three years of service shall be deemed a permanent appointment."

Because she is an assistant rather than an associate professor, she cannot secure permanent tenure by three years of service. However, the acquisition of a permanent appointment is relative to the issues involved in her case.

In State ex rel. Keeney vs. Ayers, supra, the court interpreted regulation No. 2 which held that any reappointment after three years of service constituted a permanent appointment. The distinction between a temporary and permanent appointment was expressed by the court in the following manner.

> "In this connection it should be emphasized that the only difference between a temporary and a permanent appointment under the rules is that as to the former,'without renewal the appointment

> thereupon lapses and becomes void' automatically and without hearing, and upon mere notice thereof (Regulation 5), which was given; whereas in the case of a permanent appointment, the employment automatically continues, unless terminated after an investigation and a hearing, as provided in regulations 7 and 8. The difference is thus not in the length of the tenure, but in the nature of it -- whether terminable with or without an investigation and hearing."

If it were held that a temporary appointment could be terminated only by a notice which had the Chancellor's approval then so long as there is a vacancy in the office of Chancellor, a temporary appointment would in fact be a permanent appointment with permanent tenure and terminable only after an investigation and a hearing before the Committee on Service. Such an interpretation would nullify that part of regulation No. 5 which states in regard to a term appointment that "there is no obligation whatever to renew the appointment, and without renewal the appointment thereupon lapses and becomes void." A rule of construction which is of assistance here is found in the case of Egner vs. States Realty Company, 223 Minn. 305, 26 N.W. (2d) 464, where the court said:

> "Unless required by the contract as a whole, no construction of a subsidiary provision is permissible which runs counter to and is in frustration of the dominant purpose of the contract."

In applying this rule the portion of regulation No. 5 which requires notice of non-renewal be given by the chief executive of the institution with the approval of the Chancellor should not be given such a strict interpretation as to

preclude the giving of notice during the vacancy in the office of Chancellor. In Snider vs. Carmichae., 102 Mont. 387, 58 Pac. (2d) 1004, the court said, concerning a contract, that "it must be so interpreted as to give effect to the intention of the parties at the time contracting." The intention of the parties in the contract under consideration was not to give her permanent tenure when she was employed for one year and in fact the limited term given is in derogation of permanent status.

A reasonable method was used in giving notice of non-renewal and the fact the Chairman of the Board of Education approved the notice in place of the Chancellor in no way injured her.

The fact the Committee on Service investigated and considered the non-renewal of her contract is not material as under regulation 7 and 8 such committee has jurisdiction to investigate proposed removals and suspensions of instructional and scientific staff members and here our problem is that of a legal nature.

It is therefore, my opinion that a notice of non-renewal of a contract of assistant professor given by the chief executive of the institution and approved by the Chairman of the Board of Educations is, during the time the office of Chancellor is vacant, in substantial compliance with regulation 5 of the State Board of Education.

Very truly yours,
ARNOLD H. OLSEN
Attorney General

Opinion 5 - 1955

Held: The Workmen's Compensation Act is, as to a school district, exclusive, compulsory and obligatory upon both employer and employee and there is no right to elect whether or not each shall be subject to the act.

April 4, 1955

Mr. James C. Wilkins, Jr.
County Attorney
Fergus County
Lewistown, Montana

Dear Mr. Wilkins:

You have requested my opinion as to whether it is mandatory for school districts to comply with the Workmen's Compensation Act.

In answering your question, it is necessary to consider Section 92-206, R.C.M., 1947, which reads in part as follows:

> "Where a public corporation is the employer, or any contractor engaged in the performance of contract work for such public corporation, the terms, conditions and provisions of compensation plan No. 3 shall be exclusive, compulsory, and obligatory upon both employer and employee."

There is no doubt that a school district is a public corporation, as Section 75-1803, R.C.M., 1947, provides that every school district is a body corporate. In Jay vs. School District No. 1, 24 Mont. 219, 61 Pac. 250, and State ex rel School District No. 28 vs. Urton, 76 Mont. 458, 248 Pac. 369, it was held that school districts are public corporations.

In Butte vs. Industrial Accident Board, 52 Mont 75, 156 Pac. 138, our Supreme Court considered the above quoted statute and held that plan No. 3 of the Workmen's Compensation Act is

to a city, exclusive, compulsory and obligatory upon both employer and employee. Approval was given to this conclusion in Aleksich vs. Industrial Accident Fund, 116 Mont. 127, 151 Pac. 1016, where it was held that the "Workmen's Compensation Act as to the public corporations and their employees is exclusive, compulsory and obligatory."

In your letter you suggest that Section 92-206, R.C.M., 1947, means that all public corporations, if they are engaged in an inherently hazardous industry and elect to come under the act, must take their insurance from the state, rather than from a private company or carry it themselves. This contention was specifically considered in Butte vs. Industrial Accident Board, supra, where the court said:

> "If this was the intention of the lawmakers, the least that can be said is that they made a superlative effort to conceal their intention in a multitude of useless words. To express the view of the attorney general, it was only necessary to say: 'Whenever a public corporation elects to become subject to this Act, the provisions of compensation plan No. 3 shall be exclusive as to it.' But the legislature did not so express itself; on the contrary, it declared that where a public corporation is the employer, the terms conditions and provisions of compensation plan No. 3 shall be not only exclusive but compulsory and obligatory as well. It is a general rule of statutory construction that 'every word of a statute must be given some meaning if it is possible to do so.' (State ex rel. Patterson v. Lentz, 50 Mont. 322, 146 Pac. 932.) But, if the contention of the attorney general prevailed, the words 'compulsory and obligatory' would be meaningless."

You also call attention to the fact that Section 92-301, R.C.M., 1947, states the act applies to all inherently hazardous

occupations. This section is introductory to the four following sections dealing with hazardous occupations and is primarily limited in scope to these sections. This conclusion was recognized in Aleksich vs. Industrial Accident Fund, supra, and was not construed as a limitation on Section 92-206, R.C.M., 1947.

In the Butte Case the court stated the act must be read as a whole and in light of the history of similar acts. The Court said in this connection:

> "At the time the bill for this Act was under consideration by the legislature the impression was general throughout this country that an Act compulsory upon private employers would not be constitutional, whereas the right of the state to impose the provisions of the Act upon itself could not be questioned (Wood v. City of Detroit,(Mich.), 155 N.W. 592.) There is some reason, therefore, to assume that the legislature made the Act compulsory as far as it was deemed possible to do so."

It is, therefore, my opinion that the Workmen's Compensation Act is, as to a school district, exclusive, compulsory and obligatory upon both employer and employee.

Very truly yours,

ARNOLD H. OLSEN
Attorney General

CHAPTER REFERENCES

The following official opinions of the attorney general can be found in Volume 21 of the Report and Official Opinions of the Attorney General.

Opinion 110 - 1946
Opinion 164 - 1946

The following official opinions of the attorney general can be found in Volume 22 of the Report and Official Opinions of the Attorney General.

Opinion 44 - 1947
Opinion 92 - 1948

The following official opinions of the attorney general can be found in Volume 23 of the Report and Official Opinions of the Attorney General.

Opinion 123 - 1950

The following official opinions of the attorney general can be found in Volume 24 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 78 - 1952
Opinion 124 - 1952

The following official opinion of the attorney general can be found in Volume 26 of the Report and Official Opinions of the Attorney General. (To be published)

Opinion 5 - 1955

CHAPTER XIV

LEGAL BACKGROUND

SOURCES OF SCHOOL LAW

Stephen F. Roach states that there are four basic sources of authority in the control of public education in the United States. These four sources are constitutions, legislatures, court decisions and the rulings of the appropriate governmental officers.[1]

Constitutions. The Tenth Amendment to the Constitution of the United States reserves to the several states all matters not specifically delegated to the United States. Since education was not mentioned in the United States Constitution, it is a state function.

Remmlein holds that the Fourteenth Amendment to the Constitution made many of the restrictions of the Bill of Rights applicable to the states. Hence, no state may violate any of the fundamental rights guaranteed by the first ten amendments. This includes the field of education which is within the sphere of state control.[2]

School law has been developed within the framework of

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[1]Stephen F. Roach, "Court Opinion Concerning School Boards," Educational Administration and Supervision 39:147, March 1953.

[2]Madaline K. Remmlein, The Law of Local Public School Administration (New York: McGraw-Hill Book Company Inc., 1953), p. 1; Madaline K. Remmlein, School Law (New York: McGraw-Hill Book Company Inc., 1950), p. 1.

the Federal Constitution by the provisions of the state constitutions and state statutes. Each of the forty-eight state constitutions has some mention of the state's responsibility in the field of education.[3]

State Legislatures. State Legislatures, as required by State Constitutions, have enacted literally thousands of school laws.[4] These state statutes are the most prolific source of regulations concerning public schools. Some aspects of the public school program are specifically spelled out while others are merely mentioned and the power of regulation is delegated to the State Board of Education.[5]

Like the official opinions of the attorney general, the rulings of the State Board of Education have the force and effect of law until challenged and overruled in the courts.

Court Decisions. Court decisions are primarily of two types: (1) interpretations of constitutional and statutory law and (2) the application of the principles of common law.[6] The application of the principles of common law comes about only when a particular set of circumstances has not been decided upon and the court finds it necessary to protect the rights of the parties concerned by applying general traditional

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[3]Joachim F. Weltzin, The Legal Authority of the American Public School (Grand Forks, North Dakota: The Mid West Book Concern, 1931), pp. 23 - 24.

[4]Remmlein, op. cit, p. 2.

[5]Ibid, p. 3.

[6]Ibid.

principles.

Government Officers. There are several governmental officers whose decisions are binding upon schools and school districts. The State Board of Education was already mentioned. Another officer is the State Superintendent of Public Instruction. The officer with which this study is concerned is, of course, the Attorney General of the State of Montana

The attorney general, as the chief law officer of the state, has several duties. One of these duties is that of advisor to the various other officers of the state. This advice is usually given in the form of opinions. There are three types of opinions: oral, written or letter and official.

This study is concerned only with official opinions. In this type of opinion the research is usually done by an assistant attorney general who specializes in the field under consideration and is revised and criticized by the attorney general himself or the rest of the legal staff before issuance.

Opinions are often sought because the courts cannot possibly consider all of the legal questions arising in the various departments in the state. Oftentimes there is a time factor to be considered. The office requesting the opinion may have to act quickly in the best interests of public welfare and hence might not wish to bog down the administrative system while preparing and presenting the information to the courts.

The attorney general has the highest professional responsibility for his opinions, which stand with the weight of

law, affect and even control governmental administration, and act as a protection and a safeguard for the rights and privileges of the general public.

LEGAL PRINCIPLES OF SCHOOL LAW

Although very little literature was found directly relating to the role of the attorney general in the field of education, the literature relating to the adjacent fields of school law, constitutions, court decisions and other administrative rulings seems to indicate several basic premises upon which many of the official opinions of the attorney general were based.

Local school districts are territorial divisions of a state created for the express purpose of operating public schools.[7] The agency in charge of the schools in a specific school district is the school board. The powers given to the school board are only those specifically granted and necessarily implied for the performance of the specific function of operating the public schools.[8]

The school district and the school board are state agencies and as such are subject to the will of the state legislature and the state educational authorities, except in those matters

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[7]Roger B. Hamilton and Paul R. Mort, The Law and Public Education (Chicago: The Foundation Press, Inc., 1941), p. 523.

[8]Lee O. Garber, Handbook of School Law (New London, Connecticut: Arthur C. Crofts Publications, 1954) pp.3-4; Hamilton and Mort, op. cit, p. 86.

left to local determination.[9] The powers of the school district therefore are delegated by the state and are not inherent. The school district is a territorial area populated by the residents thereof; the school board is composed of locally elected officers chosen to operate the local schools but whose responsibility is to all the people of the State of Montana rather than only to the people of their local school district. In school law, however, the district must be thought of as a unit and the school board as a body rather than as a group of individuals.[10] School districts and school boards are corporate entities.[11]

Therefore, when there is a change in the personnel of the school board, the board continues as an entity regardless of the change in membership.[12] Contracts, titles to property and other business is not carried on in the names of members of the board. It is carried on in the corporate name of the school district even though the names of members of the school board may appear on official documents as officers authorized

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[9]Calvin Grieder and Willis Everett Rosenstengel, Public School Administration (New York: The Ronald Press Co., 1954) pp. 35-36; Remmlein, Law of Local Public School Administration pp. 6-7.

[10]Remmlein, op. cit, p. 7; Weltzin, op. cit., pp. 37-39.

[11]Hamilton and Mort, op. cit., p. 87; Remmlein, School Law, p. 12.

[12]loc. cit.

to act for the local school district.[13]

Courts have held, in general, that legislation providing for school consolidation does not carry with it the right to provide transportation. Authority to transport does not carry with it the implied authority to purchase liability insurance covering the operation of transportation facilities.[14]

Courts are not in agreement as to whether a law authorizing the transportation of private and parochial school pupils at public expense is constitutional. They are generally agreed, however, that the board may not transport such pupils without statutory authority.[15]

In local elections the courts have generally agreed that the statutes must be strictly complied with but that minor irregularities are not necessarily fatal.[16] This has been particularly true in the case of elections where such minor irregularities have not been shown to have affected the result.

The school district's right to issue bonds is somewhat like its right to tax. It is not an inherent power. It is a power derived from the granting statute. The proceeds derived from the sale of school bonds can be used only for the purpose designated and for no other. In the issuance of school

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[13] Ibid. p. 13.

[14] Garber, op. cit., p. 154.

[15] Ibid.

[16] Remmlein, Law of Public School Administration, p. 240; Garber, op. cit., p. 19.

district bonds the statutes must be followed explicitly. If this is not done, the legality of the bonds may be affected.[17]

Bonded indebtedness cannot be incurred in unlimited amounts. The laws restricting the amount of bonded indebtedness must be faithfully and carefully observed if the actions of the district are to be legal.[18]

The school district has no inherent right to levy and collect taxes. Authority to do so is delegated to it from the state. The state exercises this power through constitutional and statutory enactments. In a situation where a state compels the school district or county to levy a tax for educational purposes the tax, regardless of who levies it, is a state tax.[19]

When the statute delegates to some agency the authority to levy a school tax, the mandatory provisions of the statute must be followed explicitly in order to make the tax valid.[20] This is not true, however, if the provision was made discretionary.

It must constantly be remembered that money received from taxes levied for a certain purpose must be used for

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[17]Garber, op. cit., p. 52.

[18]Garber, op. cit., p. 57.

[19]Hamilton and Mort, op. cit., pp. 51-56; Weltzin, op. cit., p. 57; Garber, op. cit. p. 46.

[20]loc. cit.

that purpose and none other.[21] For example, monies derived from a tax levied for school maintenance cannot be used to retire bonds and money collected for teachers' salaries cannot be used for building purposes.

Where the statute provides for free public education, it is generally held that a child must attend a school located in the district in which he resides in order to receive free tuition. Ordinarily the child is held to be a resident of the district in which his parents reside.[22]

The right to attend school free from the payment of tuition is not an absolute right. In some states it has been held that schools may set up reasonable rules and regulations covering admission to schools, and may reject or exclude any applicants who do not meet these requirements.[23] This, of course, cannot be done in a state whose constitution provides for a uniform system of free public education.

The major ideas expressed in this discussion can be stated briefly as follows:

1. In school matters there exists a supremacy of state regulation over city and home rule charter.
2. All school officers, no matter how appointed, are agents of the state.

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[21] loc. cit.

[22] Harry Raymond Trusler, Essentials of School Law (Milwaukee, Wisconsin: The Bruce Publishing Company, 1927) p. 58.

[23] Ibid., pp. 111-112.

3. The responsibility of local school officers is directed to the people of the entire state rather than to just the people of the locality.

4. The state legalization of school districts gives these districts only the powers to carry on certain functions delegated to them by the state. The local school district has no inherent rights. The state legislature in most states may at any time alter district boundaries, increase or restrict delegated district authority or eliminate the districts entirely.

CHAPTER XV

SUMMARY, CONCLUSIONS AND RECOMMENDATIONS

SUMMARY AND CONCLUSIONS

The one hundred thirty official opinions concerning education rendered by the office of the attorney general in the ten year period under consideration would seem to the writer to be indicative of the varied and numerous question that can arise concerning legal problems which involve education. The educational system of the State of Montana is founded on Montana's State Constitution with further elaboration by the state's Legislative Assembly, interpretations by the courts and, as is seen in this paper, the official opinions of the attorney general.

It should be noted that in the summary and conclusions in this study the tentative nature of any interpretations made by the author will be a distinct limitation upon their usefulness.

The interpretative power of the attorney general is needed as a time-saving intermediate step between state officers and the Supreme Court because the relationship between the Constitution of the State of Montana, the Montana Legislative Assembly and the interpretations of the courts appear in many instances to conflict with one another in apparent or theoretical contradictions and movement to the courts is of itself time consuming action when time may be the most important consideration.

Any real progress in education must be based upon a sound legal foundation. The needs and demands of education in the State of Montana change with the passing of time. The attorney general, however, cannot alter the laws to meet these changing needs but rather must be most careful to render all opinions in a manner consistent with the Montana State Constitution, statute law and pertinent court decisions. This, in the opinion of the writer, the attorney general has done. The office of the attorney general appears to have met every question fairly and impartially. It would seem that in allowing for changing local conditions the office of the attorney general has tried, by his interpretations, to allow freedom from state interference to local boards of education in meeting the educational needs and demands in their own local situations. The attorney general points out time and time again, however, that in the case of McNair v. School District No. 1 (87 Mont. 483, 288 Pac. 188) the Supreme Court of the State of Montana said that the board of trustees may exercise only expressly conferred and necessarily implied powers, and that the statute granting power is both a grant and a limitation. Grieder and Rosenstengel seem to concur in their work Public School Administration when they state that in most states "there is wide leeway in which boards may act so long as they follow the spirit of the law and do not contravene constitutional statutory requirements or prohibitions."[1]

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[1]Calvin Grieder and William Everett Rosenstengel, Public School Administration (New York: The Ronald Press Co., 1954) p. 111.

The opinions considered in this paper did not seem to indicate that there was any clearly discernable trend in thinking on the part of the office of the attorney general. There did seem to be more consistency of interpretation in the opinions of the two attorneys general under consideration than had been anticipated. The reason for this was found to be that both Mr. Olsen and Mr. Bottomly utilized the services of the same lawyer in research on educational problems.

It appeared to the writer that the attorney general in some instances was handling matters that were already adequately covered by specific sections in the law which do not seem to require interpretation. One instance of this is Opinion 11 of 1947 in which it was held by the attorney general that school districts may recover the cost of educating elementary children when permission for attendance has been given.

This matter seems to be adequately covered by the provisions of Chapter 203, Laws of 1943 and Section 1022 R.C.M., 1935. Chapter 203, Laws of 1943, provides in part that children may attend schools in other counties when permission has been secured and that the child's school district shall pay the actual costs of education.

Section 1022, R.C.M., 1935, provides further that a school district "may sue and be sued."

In a few of the opinions considered it was noted that an official opinion of a previous attorney general was contained within the opinion rendered. One example of this is found in Opinion 43 of 1951 in which the attorney general

quoted directly an opinion of former Attorney General Poindexter. Poindexter had stated that a school district is not liable in tort and that the decision of the Supreme Court with respect to non-liability of counties for tort and individual liabilities of county officers for neglect, applies with equal force to school districts and the officers of the school district.

Elections. The eight opinions considered in the chapter on elections bring out some vital issues. Of general interest is the ruling by the attorney general that the public meeting for the purpose of nominating school trustees in a first class district must be held forty full days before the election and that the day of the meeting and the day of the election cannot be counted in the forty full day period.

Another key opinion seems to be Opinion 86 - 1952 in which it was ruled that the names of deceased voters may not be deducted in computing the forty percent necessary for passing a bond issue. The impact of this decision might be keenly felt in the case of a failing bond election in which the vote was quite close.

A third decision which seems of general fundamental interest is Opinion 25 - 1951. This opinion states that retail beer and liquor licensees must remain closed during all school elections. The fundamental importance of this opinion is not apparent at first glance. The significance is in the fact that the law requires the closing of these establishments only in the case of a general election. In order

to rule that they must be closed also for school elections the attorney general has, in effect, ruled that school elections are general elections.

This chapter on elections gives the impression that there is some confusion in the mind of schoolmen in the matter of interpretation of the election law. This is to be expected when we consider that for a law to be effective it must be general enough to be workable in a variety of circumstances.

Trustees. A reading of the nineteen opinions considered in the chapter on trustees gives a brief idea of the powers and some of the limitations of school boards. It may be seen, for example, that the trustees have the power to lease any land and buildings which they deem necessary and which will be used for school purposes although they do not have the power to engage in any activity which is not exclusively for educational activities.

There are four opinions in this chapter which seemed to be, because of their more general nature and more general application, of more importance than the others. Opinion 43 - 1951 states that neither school districts nor boards of trustees are liable in tort for injuries of pupils. The implications here can readily be seen. School districts are immune from suit caused by negligence of school officers. Using this basic reasoning the attorney general also held that schools cannot expend money for liability insurance simply because the school, not being liable, has no need

for such insurance.

Another opinion which seems of general importance is Opinion 102 - 1952 which states that school districts cannot engage in any activity which is not exclusively for educational purposes. The importance of the opinion seems to be that schools cannot and should not engage in any activity which might be used as commercial or general service device and which therefore would be in competition with local merchants.

In Opinion 24 - 1955 the attorney general ruled that school districts cannot budget for and establish six-year high schools. Although many small communities would find it advisable and expedient, in their own situations, to budget for a six-year high school, it is not legally possible. The attorney general shows that the statutes make absolutely no provision for this set up.

Opinion 35 - 1955 deals with appointments to principalships in Butte, Montana under the terms of an agreement with the Butte Teachers Union. The importance of this opinion lies in the fact that the attorney general has upheld this agreement. It would seem that upholding this agreement is tantamount to upholding the existence of a closed shop among professional educators although this seems to have been his only legal recourse.

The twenty opinions in this chapter on trustees cover many of the powers and limitations of trustees. The office of the attorney general has been liberal in its interpretation of the law. The local boards of trustees have been allowed

as much power in the administration of local school affairs as is consistent with imposed statutory limitations. Evidence of this is seen in the attorney general's repeated references to the doctrine of implied powers.

Attendance. Although there are only five opinions in this chapter on attendance, it should be noted that there is only one central problem. That problem is tuition. In order for a district to collect tuition the child must have the permission of the county superintendent in the county of his residence to attend school out of the county and also the permission of the county superintendent of the county in which the child is to attend school.

In the attendance chapter also is found the procedure for compelling a parent to send school age children to school. The law provides a fine of not less than five dollars nor more than twenty dollars for any parent, guardian or other person having care and custody of a child between eight and sixteen years who fails to send said child to school. An alternate procedure is also provided wherein the court may require the person to give bond of one hundred dollars on condition that the child will attend school within two days and remain at such school during the term. Upon failure to comply the said parent or guardian can be sent to the county jail for not less than ten nor more than thirty days.

The central problem of tuition collection indicates that the legislature might well consider a revision of the statutes in the area of pupil residence and attendance. It would also

seem that some more workable or practical method of forcing reluctant parents to send their children to school be made since the primary method seems inadequate and the alternate method is quite cumbersome in its requirements for a court trial.

High School Districts. In the chapter on high school districts three opinions of the fourteen seem to require special attention. In Opinion 157 - 1946 the attorney general held that proportionate share of the high school district's debt must be included in computing the debt of common school districts. This is important because if the districts were considered separately the common school districts could bond independently. The attorney general, by his decision, has limited the burden of taxation. This whole picture may be changed by a referendum in 1958. The voters will determine whether or not they want the common school district to bond independently.

Opinion 130 - 1952 declares that isolated high schools are not entitled to state aid unless accredited by the state board. He added, however, that their board of trustees might vote an extra levy for maintaining their school.

In Opinion 91 - 1954 the attorney general ruled that non-accredited high schools were not entitled to the county ten mill special high school tax. This opinion seems important because it might easily have served as one means of forcing a consolidation and reorganization of high schools. However, later legislation has authorized distribution of county taxes

to non-accredited high schools.

An opinion which is related to others in a different chapter is Opinion 175 - 1946 which deals with attendance of high school pupils. It should be noted that although grade school pupils may attend schools in other counties with permission and that such counties will receive reimbursement based upon actual costs of education, districts in which out of county high school pupils are in attendance receive only one hundred fifty dollars regardless of educational costs. This inequality might merit legislative consideration, investigation, and possible legislative correction.

In the remaining opinions will be found a variety of information. High schools may issue bonds for construction. The whole of the county must be divided into high school building districts and these boundaries are not altered by the merger of common school districts. High school districts must be created if requested by the county high school board of trustees. Property of an abolished county high school should go to the district maintaining a high school. The territory of one high school district may be transferred to another.

The opinions on high school districts are so closely interwoven with common school districts that the following plan is suggested. Would not the legislature do well to consider unifying all of the small independent common school districts within a high school district under the administrative head of the high school superintendent? It would seem that

this might alleviate many of the problems brought out not only in the chapter on high school districts but also in the chapter concerning budgets and levies and in the chapter on consolidation.

Professional Staff. Chapter VI on the Professional Staff has only twelve opinions but seems to be a chapter of considerable importance because of the relationship of these opinions to the entire teaching staff and the potential bearing on teacher turnover in the state of Montana. There are two opinions which deal directly with teacher tenure. They are Opinion 47-1951 and Opinion 26-1955. These opinions basically tell what action a teacher must take in case of being deprived of tenure and also what actions the board must take.

Opinion 23-1949 explains that a teacher must retire on September 1st after his or her seventieth birthday. This will probably be felt most strongly when a teacher of this age is employed by a district and when both district and teacher feel that it would be beneficial to the school children to retain the teacher.

There are two opinions which deal with teachers' associations and the conventions of these associations. In Opinions 9 and 108 the attorney general held that if a school district closes its schools during the state convention of any teachers' association all teachers must be paid regardless of membership or attendance. Whether for good or bad it must be noted that the attorney general has placed the American

Federation of Teachers and the Montana Education Association on an equal plane. In the opinion of the writer the teaching profession would do well to consider the fact that one professional teachers' organization would present a united, stronger front, capable of gaining the respect and prestige the profession should claim. Since the profession itself presented this problem to the attorney general by presenting him with the dilemma of two professional organizations thus giving him no choice but to recognize them both, it becomes incumbent upon the educators to solve their own problem by uniting.

The attorney general also has ruled that married women teachers must have the same employment benefits as single teachers. They may not be discriminated against in any way.

In another opinion the attorney general states that a county superintendent cannot occupy such office and also hold the position of teacher. The reasoning of the attorney general on this point is that it would be impossible for the superintendent to adequately supervise himself.

Budgets and Levies. The twenty-eight opinions in the chapter on budgets and levies indicate the numerous problems which can arise in this field. The opinions in this chapter are relatively unrelated except for their general application to school district monetary problems. The reader will quickly realize that although there may be broad general application of the majority of these statements the very divergence of their subject matter precludes the possibility of a well

connected general summarization.

Here is one area in which the board of trustees is very definitely limited in its powers. The statutes are specific, possibly too specific, in their limitation of power in this field. This is easier to understand when one takes into consideration that school trustees are considered to be agents of their state and not of their local districts.

Some of the basic ideas expressed by the attorney general in this field may be stated quite generally. School districts may provide in the current budget for an anticipated favorable vote on social security. Budgets may be set up to provide for school site purchases. The amount paid for transportation is governed by the transportation budget. Junior colleges are to be financed by the inclusion of the necessary amount in the high school budget and by a tuition not to exceed one hundred twenty-five dollars per year. Outstanding warrants are to be paid from the budget of the prior year. Proceeds from a bond issue must be used for the purpose approved by the voters. Although items may be transferred from one fund to another within a budget, they may not be transferred from one budget to another. The board of school budget supervisors is limited in power and cannot take power away from the board of trustees. While the excess general fund monies of both elementary and high school may be used the next year to meet state aid deficiencies, only the high school may also use it in the field of permissive levies. Kindergarten pupils may be counted in the A.N.B. after their sixth birthday. In a

joint school any deficiency in state aid must be met by a levy on the entire district. Funds received under Public Law 874 may be used only to alleviate local tax burdens.

Taxation. The three opinions in this chapter were segregated from the chapter preceding them because of the fact that they consider the problem of money and taxation from such a divergent stand. Opinion 60 - 1954 and Opinion 40 - 1949 are quite clear in their position. School district property used for educational pruposes is tax-exempt. Opinion 79- 1950 merely indicates that erroneously collected taxes may be refunded when claims are properly filed.

Construction, Repairs and Improvement. In the four opinions in the chapter on construction, repairs and improvement the attorney general stated that persons bidding on jobs must prove to the satisfaction of school and other state officers that they are responsible persons. This may be done by deposit of a certified check or some other security. The attorney general has also stated that the insurance payment received by the school district for the destruction of an elementary school may be used for the purchase of a site and a new building without a vote of the electorate. In the case of necessary repairs the contract may provide for a payment over a period of three years. If the case should necessitate a bond election, an architect's fee may be paid from the proceeds of the bond sale.

Transportation. In the chapter on transportation there were only ten opinions rendered. More requests for opinions

arose from a lack of understanding of the state transportation schedule than from any other single cause.

In the elementary district one third of the cost of transportation is paid by the state, one third by the county and one third by the district. Payments are based upon a state transportation schedule, which was indicated by the questioners to be inadequate.

In the high school transportation system one third is paid by the state and two thirds by the county.

In another opinion the attorney general ruled that parochial school children may be transported, but that they must pay a proportionate cost of the operation of the bus. The school district therefore cannot be said to be helping in the support of sectarian education.

Another point made by the attorney general is that if the board elects to transport one child, transportation must be provided for all children in the district. All children are entitled to transportation regardless of the length of time they have resided in the district. If the child lives in a district which does not maintain a school, he is entitled to transportation costs.

It seems that the attorney general by these opinions has removed any chance of favoritism being shown by the school district.

Consolidation. The chapter on consolidation had only nine opinions in it. A central problem approached in this section was the assumption of bonded indebtedness. In a

consolidation of the school district bonded indebtedness of each district is assumed by the new district formed. In annexation a third class district does not assume the bonded indebtedness of the third class district. When a district is assuming bonded indebtedness voters in the election on consolidation must be registered and their names must appear on the preceding assessment roll. In the case of consolidation with a joint district, there must be formed a new joint school district.

Another opinion states that the county superintendent is the person responsible for ascertaining the number of qualified electors in a school district for the computation of the required per cent on petition for annexation. Since registration has no part in determining the qualifications of an elector it may be seen that the county superintendent has a most difficult problem in attempting to ascertain the per cent of the qualified voters signing the petition.

The small number of opinions rendered in the area of school consolidation, annexation and reorganization at a time when such things are growing on a national scale poses an interesting question. Does Montana school law need revision to make these things easier? Perhaps the push should come more forcibly from the state level since education is a state function. The small number of opinions indicates that probably very little consolidation is taking place in Montana. Assuming that consolidation would benefit the education of our youth it may be said that not enough is taking place.

School Sites. In the chapter on school sites of the nine opinions rendered it was noted that the most prevalent problems were those involving abandoned school districts. It should first be noted that the county superintendent must declare a school district abandoned where school has not been held for three years and actual bus transportation has not been provided. Also mentioned was the fact that when requested by parents of at least three children school must be provided in the abandoned district by the district to which attached. The abandoned district retains liability for its own bonded indebtedness.

Other opinions in the chapter relate to various problems. School sites may be sold by the board of trustees regardless of the proposed use by the buyer. Schools may be constructed adjacent to existing buildings without an election to designate the site. High schools financed by bonds may be built on land owned jointly by the county high school and a school district. County commissioners may not give a public county park to the school district as a school site.

Miscellaneous Opinions. In the thirteenth chapter were placed those opinions of the attorney general which did not seem to fit logically into any of the regular categories and which would not commonly affect the administration of our public schools. These opinions may be briefly stated as follows: Liquor licenses will not be granted for use on premises across the street from schools. School districts

may not enter into oil and gas leases. The residence of a child in the state orphans' home is that of his parents and if they leave the state, the expense of his education becomes the responsibility of the State of Montana.

The title to a school building erected on private land where there was no written agreement remains in the district and can be removed by the district. Notice of non-renewal of a contract of an assistant professor given by the chief executive of an institution and in the absence of the Chancellor complies with regulation 5 of the State Board of Education. The Workmen's Compensation Act is, as to a school district, exclusive, compulsory and obligatory both to employer and employee without the right to elect whether or not each shall be subject to the act.

One opinion which has had far reaching consequences is opinion 78 - 1952 in which Attorney General Olsen stated that educational benefits as provided by state law for veterans of any of the wars of the United States may be extended to veterans of the Korean Conflict. In writing this opinion the attorney general referred to statements of authoritative individuals such as the Judge Advocate of the Army and even went back to the case of Hamilton v. McClaughney which concerned the Boxer Rebellion in China. According to a personal talk with former Attorney General Olsen, much research was done on this problem and in searching for a precedent it was found that no other state had taken a similar step with regard

to the Korean Conflict. Montana, therefore, was the first state to grant wartime benefits to Korean veterans.[2]

The number of problems presented to the attorney general during this ten year period and their variance in subject matter, together with the vast number of problems presented to the various county attorneys during this same period, has led the writer to the conclusion that the legislative assembly at its next session might well consider a complete revision of school law in this state.

RECOMMENDATIONS

If a compilation and segregation of the official opinions of the attorney general such as has been presented in this paper was to be kept up to date and disseminated to interested parties, it might then be possible to eliminate some unnecessary work on the part of the attorney general and his staff.

A looseleaf manual containing all official opinions of the attorney general relating to education would in all probability be the most practical and economical type to be kept up to date. The office of the attorney general could then send out mimeographed copies of the official opinions of the attorney general to all offices designated to receive copies

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[2]June 13, 1957. Permission to quote secured.

of the official opinions. This would eliminate the time lag which occurs while offices wait for the bound copies of the Report and Official Opinions of the Attorney General. An undertaking of this type would also serve many of the purposes of the digest which was recommended by former Attorney General R. V. Bottomly. He felt that "such a volume would be incalculable assistance to county attorneys, all state and county officers" and to the office of the attorney general.

Distribution should of course, include the university units, junior colleges, state custodial institutions, vocational schools, the Department of Public Instruction, city superintendents of schools, county superintendents of schools, district superintendents of schools and the office of the county attorney of each county. Since it would seem to be almost impossible for a copy to be sent to each public and private school teacher in the state it is recommended that a copy be placed in the libraries of larger schools and institutions. A copy should also be placed in each public library for the information of interested school patrons.

It is also recommended that a committee composed of the attorney general and selected county attorneys or competent persons designated by them go over these opinions at least once every five years for the purpose of deleting those which have been rendered obsolete by reason of new laws enacted by the Legislative Assembly or recent decisions of the courts. By discarding these opinions the proposed manual can be kept to a minimum size. This recommendation should not be

so construed as to indicate that all opinions rendered by the attorney general should not be kept in bound volumes in some designated depository.

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